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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 197

ESTABAN ADAM, PETITIONER,

vs.

WILLIAM SAENGER ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED JULY 6, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

SUPREME COURT OF THE UNITED STATES

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WILLIAM SAENGER ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

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IN DISTRICT COURT OF JEFFERSON COUNTY, TEXAS, 60TH JUDICIAL DISTRICT

No. 45663

ESTEBAN ADAM

vs.

WILLIAM SAENGER et al.

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION—Filed November 22, 1935

To the Hon. R. L. Murray, Judge of said Court:

Esteban Adam, a citizen and resident of Los Angeles County, State of California, plaintiff, with leave of court obtained, files this his first amended original petition in lieu of his original petition herein, and complaining of William Saenger, P. P. Butler, H. A. Perlstein, Clarence A. Miller, John F. Pipkin, Morris M. Mothner, as heir and representative of R. M. Mothner, deceased, Mrs. Jenet Smith, W. O. Hoffmeyer, Mrs. Fannie W. Pogue, A. A. Perez, R. W. Deshon, Wm. Wahrmund, Mrs. B. R. Norvell, A. M. Kaufman, A. M. Kaufman, trustee, John Dollinger, Jr., Mrs. Lucy May Sanders, Ray Hoopes, W. H. Garretson, C. A. Lord, D. A. Pruter and H. A. Sanders, all of said defendants being residents of Jefferson County, Texas, for cause of action respectfully alleges and shows unto the court;

1.

On the 24th day of May, 1933, in that certain suit and cause of action styled and numbered Beaumont Export & Import Company, a Texas Corporation, plaintiff and cross-defendant, vs. Rodolfo Montes, defendant and cross-complainant, No. 279850 in the Superior court of the State of California in and for the County of Los Angeles, Rodolfo Montes, as defendant and cross-complainant, recovered final judgment in his cross action against the said Beaumont Export & Import Company for the sum of Five Thousand Dollars ($5,000.00) and all costs of court, which said costs amounted to the sum of Four Dollars ($4.00), which said

[fol. 13] principal sum of said judgment bears, under the laws of California, interest at the rate of seven per cent per annum from the date of said judgment. Thereafter the said Beaumont Export & Import Company by and through its duly authorized attorneys of record filed a motion to set aside the said judgment, which said motion was regularly heard by the court that had entered the said judgment and the said application was by said court in due course denied and no appeal therefrom having been taken or perfected within the time required by the laws of California, the said judgment thereby became final and is still a valid and subsisting judgment and no part thereof has been paid, though repeated demands for payment have been duly made. Thereafter, to-wit, on January 31, 1935, in due course of procedure under and in accordance with the laws of California and upon the ex parte motion of the said Rodolfo Montes, praying that said court dismiss the complaint of the said Beaumont Export & Import Company, and said court being fully apprised of the premises and it appearing to the court that there had been an inexcusable delay of more than five years after the filing of defendant's answer in prosecuring the said action, said court ordered, adjudged and decreed that the complaint in the above entitled action be and the same was dismissed and that the defendant, Rodolfo Montes, have and recover from the said plaintiff his costs and disbursements amounting to the sum of $4.00.

2.

The said judgment and every part thereof decreed and entered in the above entitled and numbered cause, to-wit, Beaumont Export & Import Company, a Texas Corporation, plaintiff and cross-defendant, vs. Rodolfo Montes, defendant and cross-complainant, No. 279850, was decreed and entered by a duly constituted superior Court of the State of California having general jurisdiction and after having acquired and having jurisdiction both of the subject matter and of the corporation and person constituting [fol. 14] the parties to said suit, in that, the said Beaumont Export & Import Company, a Texas Corporation, filed its said suit against Rodolfo Montes, then a resident or a citizen of the County of Los Angeles, State of California, and thereby voluntarily submitted itself and its alleged cause of action to the jurisdiction and authority of said

court; and thereupon Rodolfo Montes duly answered to said suit and subsequently filed his cross action or complaint against the said Beaumont Export & Import Company and obtained due, legal and actual service, in his said cross-complaint, on the said Beaumont Export & Import Company by making personal service on its duly authorized attorneys of record in said cause of a true copy of the said cross-complaint, which said service started or set in motion the running of the time within which the said corporation was required to answer, as expressly provided by the laws and procedure of the State of California; which said laws and procedure provided that a default judgment may be entered for failure to answer and plead to such cross-omplaint upon the service aforesaid. Wherefore, the said court of California, as a basis for and as a condition precedent to rendering the judgment aforesaid, had thus acquired actual and personal service of notice within its jurisdiction upon the said Beaumont Export & Import Company while said company and its duly authorized attorney of record were both within the territorial jurisdiction of said court.

3

The time provided and fixed by the laws of California for taking and perfecting an appeal from the said judgment and all parts thereof has long since expired and no appeal therefrom has ever been taken or perfected and no such appeal is now pending, either as to the judgment obtained on said cross action or as to the judgment of dismissal of plaintiff's cause of action. Wherefore, the said judgment in favor of Rodolfo Montes on his cross action [fol. 15] or cross-complaint against the Beaumont Export & Import Company was and is within itself a final judgment under the statutes and decisions of the State of California applicable thereto, regardless of the further judgment of the court entered on January 31, 1935, dismissing the cause of action filed by the Beaumont Export & Import Company for want of prosecution, such action of the court having been taken after the period of three years subsequent to the dissolution date of said corporation, and such three year period having expired on the 15th day of September, 1933, upon and after which latter date the said plaintiff corporation could not, under the laws and

decisions of the State of Texas, sue or be sued or perform any other legal act whatsoever, and its said suit and cause of action was thereby ipso facto dismissed and ceased to exist on and after the said 15th day of September, 1933, without the aid of the court's judgment of dismissal as aforesaid, wherefore, the said judgment in favor of Rodolfo Montes on his said cross action or complaint of itself alone, or, in the alternative, in connection with the judgment of dismissal by the court, and for the further fact that on and after the 15th day of September, 1933, plaintiff's cause of action was, as a matter of law, dismissed as aforesaid, constitutes a final judgment therein and same is now a valid and subsisting judgment under the laws of the State of California.

4

Under the applicable statutory provisions and the decisions of the courts of last resort of the State of California, a cross action or cross complaint is regarded, deemed and construed as another suit separate and distinct from the main action in which it is filed and a judgment thereon is a final and not interlocutory judgment regardless of whether or not the main or plaintiff's cause of action has been adjudicated; and execution thereon may be legally issued even though no final judgment or other disposition [fol. 16] has been made in plaintiff's cause of action; and such is the holding in Ritter vs. Braash, 11 Cal. App. 258, 442; 104 Pac. 592; Farar vs. Steenbergh, 173 Cal. Rep. 94; 159 Pac. 707.

5

That proper, legal and personal service was duly had upon the Beaumont Export & Import Company, plaintiff in the California suit, as aforesaid, is shown by the following record facts and circumstances, to-wit: after the said Montes, defendant in said suit, had duly filed his answer to said plaintiff's asserted cause of action and after amendments to their respective pleadings had been filed by both parties therein, the said Montes, on November 7, 1932, with express leave and order of the court first obtained, filed his cross-complaint therein, as shown by his pleading, a true copy of which is hereto attached and marked exhibit "A" and made a part of this petition. On November 9, 1932, due service was made upon the said

plaintiff by serving a true copy of the said cross-complaint and order of the court permitting the filing thereof upon plaintiff's then attorney of record, Richard F. Bailey; the said Bailey being the surviving member of the law firm of Patterson, Bailey & Montgomery, the original attorneys of record for the plaintiff, and the said Bailey then and there being the attorney of record in said cause for the said Beaumont Export & Import Company; the said service being shown by "an affidavit of service" by W. M. Eggeman, a true copy of which is hereto attached, marked Exhibit B and made a part of this petition. No answer having been filed to the said cross action, the attorneys for the said Montes filed of record notice that on the 20th day of April, 1933, at the hour of ten A. M., or as soon thereafter as counsel can be heard, in department 43 of said court, that cross-complainant, Montes, would move the court for an order to enter the default of the cross-defendant, Beaumont Export & Import Company, for failure to appear and answer or plead to the said cross-complaint, and thereupon duly served upon the said Richard F. Bailey a true copy of such notice and the said Bailey acknowledged receipt of such copy by signing the original, as shown of record by the said notice and acknowledgment of receipt, a true copy [fol. 17] of which is hereto attached, marked Exhibit C and made a part of this petition. The said Bailey failed to appear on the said 20th day of April, 1933, and thereupon counsel of record for said Montes phoned him and reminded him of the fact that the hearing on said motion had been set for said date, and thereupon said Bailey asked the court to continue the hearing until the 4th day of May, 1933, and at his request such order was entered; and that thereafter on the 4th day of May, 1933, the said Bailey still not appearing in the matter, the attorneys for Montes called the said Bailey on the telephone and inquired if he was ready to proceed with the hearing and motion and the said Bailey thereupon stated that he was busy with other matters and that he had written to his client, the Beaumont Export & Import Company, and desired a postponement of the hearing on the motion until he received a reply from his client and that thereupon, at his request, it was agreed to let the hearing on the motion be continued and it was continued until May 17, 1933; and at the same time the attorneys for Montes wrote the said Bailey a let-

ter and esposited same in the mail in the regular course, stating that in pursuance of the above mentioned conversation they had continued the hearing until May 17, 1933, at ten A. M., in department 43 of said court, in which letter he requested the said Bailey, "If you hear from your company, I will be pleased to have you communicate with me relative to this motion"; thereafter the attorney for Montes not having heard anything further from the said Bailey, proceeded with the hearing of the motion at the time and place set, as aforesaid, and on May 24, 1933, judgment in favor of the said Montes against the Beaumont Export & Import Company on said cross action was duly rendered and entered by the court, a true copy of which is hereto attached, marked Exhibit D and made a part of [fol. 18] this petition. On the 31st day of January, 1935, upon motion of the said Montes, and it appearing to the court that there had been an inexcusable delay of more than five years after the filing of defendant's answer in prosecuting the said action, it was ordered, adjudged and decreed by the court that "the complaint in the above entitled action be and the same is hereby dismissed, and that the defendant have and recover from the plaintiff herein his costs and disbursements incurred in this action, amounting to the sum of Four Dollars ($4.00)," as shown by a true copy of said judgment, which is hereto attached, marked Exhibit E and made a part of this petition.

6.

On the 6th day of September, 1933, notice was duly served upon the said Richard F. Bailey that judgment theretofore rendered in favor of the cross-complainant and against the plaintiff and cross-defendant had been entered by the clerk of said court on the 31st day of May, 1933, in Book 867 at page 262 of judgments in the office of the clerk of said court; this being shown by a true copy of said notice and acknowledgment of receipt thereof by the said Bailey, hereto attachec, marked Exhibit F and made a part of this petition. On November 15, 1933, said Richard F. Bailey duly served notice upon the attorneys of record for Montes, to-wit, Pelton, Warne & Balter, that on the 23rd day of November, 1933, at ten o'clock A. M., on said date, or as soon thereafter as said matter could be heard in the courtroom of department 43, the Beaumont

Export & Import Company, a Texas corporation, would move said court for its order setting aside the default entered on the 24th day of May, 1933, and permitting plaintiff and cross-defendant to file its answer served therewith; also stating that the said judgment was entered against the plaintiff and cross-defendant through the mistake, inadvertence, surprise or excusable neglect of plaintiff and cross-defendant's counsel and that said motion would be based [fol. 19] upon the affidavits of Richard F. Bailey, Lucile Holder and Adolph Levy, filed therewith, and upon the answer duly verified of plaintiff and cross-defendant, each and all of which said documents were attached thereto, etc., as shown by a true copy of said "notice and motion to set aside default" attached hereto and marked Exhibit G; and also true copies of affidavits as follows: Copy of the affidavit of Richard F. Bailey, marked Exhibit H; copy of affidavit of Adolph H. Levy, marked Exhibit I, and copy of the affiadvit of Lucille Holder, marked Exhibit J; all of which are attached hereto and made a part of this petition. At the same time the said Beaumont Export & Import Company, through its said attorney of record, Richard F. Bailey, filed its answer, duly verified, to said cross-action, a true copy of which said answer and verification is hereto attached, marked Exhibit K and made a part of this petition.

7.

In reply to the motion aforesaid to set aside the said judgment and to the evidence and affidavits submitted in support thereof, as shown in the next preceding paragraph, the said Montes, through his attorneys of record, filed affidavits of the following witnesses: Affidavit of W. M. Eggeman, copy of which is hereto attached, marked Exhibit L; affidavit of Clore Warne, a true copy of which is hereto attached, marked Exhibit M and made a part of this petition. Thereupon, in reply to said affidavits filed on behalf of the said Montes, the Beaumont Export & Import Company filed a counter-affidavit by Richard F. Bailey, a true copy of which is hereto attached, marked Exhibit N and made a part of this petition, and in reply to the said counter-affidavit of Richard F. Bailey, Clore Warne, one of the attorneys for Montes, made and filed an affidavit in said cause, a true copy of which is hereto attached, marked [fol. 20] Exhibit O and made a part of this petition.

8.

The statutes of the State of California, in force at all times herein mentioned and still in full force and effect, as applicable to service and proper procedure in cross actions and other actions pending in the courts of said state are of the tenor following:

"Notices and papers, when and how served. The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

"1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office; * * * (Code of Civil Procedure, Section 1011.)

The decisions of the courts of last result of the State of California in construing the aforesaid statutory provisions, hold that proper legal service may be made of a cross action on the adverse party by serving his attorney of record in the manner stated, to-wit, by making service of the papers or instruments either by delivering same personally to such attorney of record, or, in the alternative, if it is made during the attorney's absence from his office, by leaving the notice or other papers with his clerk therein or with the person having charge thereof; or, when there is no person in the office, legal service may be made by leaving the notice or other papers between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office of such attorney of record; and the said decisions of [fol. 21] California further hold that service on the attorneys for the plaintiff of a copy of the cross-complaint starts the running of the time within which they are required to answer and that a default may be entered for failure to answer or plead to such cross-complaint; and the following California cases so hold: Ritter vs. Braash, 11 Cal. App. 258; Estate of Nelson, 60 Pac. 772; Rose vs. Mesmer, 66 Pac. 594; Wood vs. Johnston, 96 Pac. 508; Farar vs. Steenbergh, 159 Pac. 707, 173 Cal. Rep. 94.

The said service was made in the instant cause, on the cross action filed by the said Montes in the said California Court, on the attorneys of record for Beaumont Export &

Import Company while the cause of action filed by the said Texas Corporation was still pending therein and before the expiration of the three year period following the dissolution of said Texas Corporation, though at the time said cross action was filed and the service thereon made the said corporation had been legally dissolved.

9

The three year period following the dissolution of the said Beaumont Export & Import Company terminated September 15, 1933, (the judgment on the cross action having been theretofore rendered) but on the 15th day of November, 1933, after the said three year period had terminated and at a time when the said corporation was legally and completely dead and without any legal powers under the statutes and decisions of the State of Texas, under whose laws it was created and dissolved, the said statutory trustees of said dissolved corporation, as hereinafter named, continued to prosecute its original cause of action against Montes, or permitted the said suit to remain on the docket of said court, and also continued to defend the said cross action by filing a motion in the name of the said Beaumont Export & Import Company to set aside the said Judgment on the cross-action and in support thereof filed, through their attorneys of record, the said Richard F. Bailey, purporting to act as attorney of record for the said Beaumont [fol. 22] Export & Import Company, the various affidavits above described, and thereupon put in issue and litigated before said court all of the issues of fact relating to whether or not proper legal service, under the laws, procedure and decisions of California, had been obtained in the said cross action, such as (a) whether said Bailey, as attorney of record for the Beaumont Export & Import Company and for the statutory trustees thereof, had been properly served, under the California laws, with copy of said cross action, (b) whether or not the said Bailey, in his capacity aforesaid, had been served with notice of the motion filed by Montes and his attorneys to enter the default of the cross-defendant, Beaumont Export & Import Company, for failure to appear and answer or plead to the said cross-complaint, and whether or not the said Bailey's signature acknowledging the receipt of a copy of the said notice or motion on the 15th day of April, 1933, was his bona fide signature, and as to whether

or not he had actually signed the original of said motion and received a copy thereof, (c) whether or not the hearing on said motion to enter the said judgment by default was continued or postponed on two different occasions at the request of the said Bailey, in his capacity as aforesaid, and (d) all other fact issues relating to proper service that could or should have been put in issue, litigated and determined by the court in passing upon and rendering its final order in granting or refusing the cross-defendant's motion to set aside the default judgment, and the court found and determined, both expressly and by necessary implication, all of said issues of fact with respect to the proper legal service, under the laws and decisions of California, in favor of the said Montes and against the said Beaumont Export & Import Company and its said statutory trustees, who litigated the said issues in the name of the then defunct Beaumont Export & Import Company; wherefore, all of the said issues of fact relating to service thereupon became and now are [fol. 23] res judicata as among the parties, to-wit: Montes and his privies and successors in interest on the one hand, and on the other, the Beaumont Export & Import Company and its statutory trustees hereinafter named, all of whom are thereby estopped to assert or to maintain anything to the contrary; all of this being shown by the action of the court in overruling their said motion to set aside the judgment on the cross action, a true copy of which said motion is hereto attached, marked Exhibit P and made a part of this petition.

10

Every and all of the aforementioned instruments of record on file in the said cause in the California court have been duly exemplified in strict compliance with the laws of the United States applicable thereto, as shown by a true copy of said exemplification hereto attached and marked Exhibit R, containing and expressly mentioning all of said instruments, except only the final order of the court overruling cross-defendant's motion to set aside the said default judgment, which is also exemplified in the same manner but under separate cover, and also the docket entries in said cause, exemplified in the same manner, but under separate cover, marked Exhibit Q and made a part hereof.

11

The said statutory trustees of the Beaumont Export & Import Company, hereinafter named, are further estopped to allege, contend or to maintain that the said service had on the said cross action upon Beaumont Export & Import Company was improper or inadequate in any manner whatsoever, because they knew that the said corporation had been dissolved on the 15th day of September, 1930, while they were officers and directors thereof, and had themselves, in connection with the other stockholders, caused and brought about its said dissolution, and having such actual knowledge, they fraudulently continued to prosecute said original suit against the said Montes, or to permit same to remain on the docket and to defend the said cross action [fol. 24] of Montes against the said corporation in the name of the corporation, and designedly, fraudulently or negligently concealed from the court and from the said Montes and his attorneys, and carelessly and fraudulently failed to make known to them, the fact that the said corporation had been dissolved; wherefore, they should not now be heard to complain of any alleged inadequacy of service upon the said cross action, for that, in all of said acts the said statutory trustees were the real parties in said suit and prosecuted and defended as aforesaid in the name of the said corporation merely as a convenience for themselves and for their own benefit, or for the joint benefit of the said statutory trustees and the other stockholders of said corporation.

12

The said statutory trustees of the Beaumont Export & Import Company, in voluntarily entering their appearance in the said California court for the purpose of having the said judgment on the cross action set aside, and in filing their answer to said cross action, all of which was fraudulently done, as aforesaid, in the name of the Beaumont Export & Import Company as a corporation, after its existence and powers were wholly lost and had ceased to exist for any purpose whatsoever, thereby made their own personal appearance in said court for the purposes aforesaid, by and through the said Richard F. Bailey, who was in fact, under the circumstances, their own attorney of record and retained by them and authorized to represent them in said matters, and their said personal appearance therein was for all purposes

and not in anywise limited to the specific purpose of making known to the court their contention that the necessary or proper service upon the cross action had not been had as a basis for the rendition of a valid judgment under the statutes and decisions of the State of California; and thereby they [fol. 25] submitted themselves personally to the jurisdiction of said court for all purposes and they are estopped to claim or assert anything to the contrary. During all of said times neither the said California court, nor the said Montes, nor the said attorneys of record for the said Montes, had any knowledge, either actual or constructive that the said Beaumont Export & Import Company had been dissolved; the said dissolution having taken place in the city of Austin, State of Texas, and that fact not having been called to the attention of any of said persons by the said statutory trustees, or by the attorneys of record either for said corporation or for said trustees.

13

By voluntarily entering their appearance in the said California court, by and through their duly authorized attorney of record, Richard F. Bailey, in moving the court to set aside the said default judgment and at the same time filing their answer to the cross action, the said statutory trustees of Beaumont Export & Import Company, both for the stockholders and creditors thereof, and in litigating the fact issues of service, as aforesaid, and in requesting and obtaining, through their said attorney of record, two continuances and postponements of the hearing of cross-plaintiff's motion to enter judgment by default (such facts necessarily by implication having been determined by the court in passing upon the motions aforesaid) the said statutory trustees for the stockholders and creditors of the Beaumont Export & Import Company and the said Beaumont Export & Import Company itself, during its legal life and while invested, under the laws of Texas, with the power and authority to sue and be sued, waived all defects, improprieties or illegalities, if any existed, with respect to the service on the said cross action and with respect to service on all subsequent motions and procedure relating thereto; and the said [fol. 26] Beaumont Export & Import Company, during its legal life, to-wit, up to the 15th day of September, 1933, and the said statutory trustees for the stockholders and creditors of the said corporation after its dissolution, are thereby

legally estopped to claim or to assert that proper and legal service, under the laws and decisions of the State of California, was not obtained on the said cross action.

14

The laws, jurisprudence and decisions of the courts of last resort of the States of Texas and of California are the same, or substantially so, as applicable to the facts and circumstances alleged in the preceding paragraphs relating to issues of estoppel and waiver aforesaid, and of the issue of res judicata as alleged.

15

On the 7th day of June, 1933, the said Rodolfo Montes being then the legal and equitable owner and holder of the said judgment, decreed and entered in his favor on his cross action or complaint as aforesaid, for valuable consideration received by him, sold, assigned and transferred all of his right, title and interest therein to Consuelo H. De Montes; and on the 16th day of September, 1933, the said Consuelo H. De Montes, being then and there both the legal and equitable owner and holder of said judgment and of all right, title and interest therein, for a valuable consideration received and acknowledged for her, sold, assigned, transferred, set over and conveyed unto the said Esteban Adam, the plaintiff herein, all of her said right, title and interest in and to the said judgment; and the said Esteban Adam as plaintiff in this cause is now the legal and equitable owner and holder of all right, title and interest in and to the said judgment.

16

At the time of the filing of said suit in the court of California as aforesaid and long prior thereto, the Beaumont Ex-[fol. 27] port & Import Company was a corporation duly and legally incorporated under the laws of the State of Texas with its principal office in Beaumont, Jefferson County, Texas; but sometime after it instituted said suit, and while such suit and cross action were still pending, the said corporation, by vote and consent of its then stockholders and in pursuance of the laws of the State of Texas, was legally dissolved on the 15th day of September, 1930, and a certificate of such dissolution duly issued by the Secretary of State of the State of Texas. No receiver has ever been appointed by any

court of competent jurisdiction, nor in any other manner, for the said dissolved Beaumont Export & Import Company.

17

At the time the said corporation was dissolved as aforesaid, William Saenger was its president and its directors were: William Saenger, P. P. Butler, W. H. Garretson, H. A. Perlstein and Charles H. Weinbaum; and the said president and directors thereupon became, were and still are trustees of the creditors and stockholders of the said Beaumont Export & Import Company and were, as such trustees, invested with all of the power and authority as expressly provided by the statutes, laws and decisions of the State of Texas; and the said president and directors of said dissolved corporation accepted the said trust as such trustees for the stockholders and creditors thereof and from the date of the said dissolution to the time of the filing of this suit they have, as plaintiff is informed, believes and so alleges, acted as such trustees and have had and exercised full charge, control and possession of the assets belonging to the said Beaumont Export & Import Company at the time of its dissolution, and have, from time to time, converted such assets into monies and have already distributed the said monies or [fol. 28] a large part thereof among the stockholders, who are now in possession and enjoyment thereof, without first having paid its said indebtedness to the said Rodolfo Montes, that is, his claim against the said corporation as represented in his cross action in the suit aforesaid and without having paid the judgment obtained by the said Rodolfo Montes as a result of said claim. Plaintiff is informed and believes and on such information and belief alleges that the said trustees have collected and converted into money the assets of said corporation in the total sum of approximately One Hundred Forty Two Thousand Five Hundred Dollars ($142,500.00) and that some of said monies have been distributed among the stockholders of the Beaumont Export & Import Company, and that as a result of such a large distribution of its assets among its stockholders, there is probably not, or may not be, enough money left in the possession of such trustees to pay plaintiff's said judgment, interest and costs of court; that said trustees were guilty of either actual or constructive fraud or of negligence in distributing the said assets among the stockholders

without first paying plaintiff's judgment; that on account of such actual or constructive fraud or negligence on the part of said trustees in distributing and paying out said monies to the stockholders, plaintiff is entitled and sues to recover judgment against the said trustees, both jointly and severally, and against each of them personally, for the amount of his said judgment, interest and court costs.

18

In the alternative, plaintiff is informed and believes and on such information and belief alleges that the said statutory trustees for the stockholders of the said dissolved Beaumont Export & Import Company, to-wit, William Saenger, P. B. Butler, W. H. Garretson, H. A. Perlstein and [fol. 29] Charles H. Weinbaum, have not distributed among the stockholders all of the monies, properties and proceeds from properties sold, such as belonged to the said corporation on the date of its dissolution, but that, on the contrary, they have large sums of such monies, properties or assets still on hand and undistributed and amply sufficient to pay the judgment upon which this suit is brought and all interest and costs that have accrued or may accrue both in the said California court and in this court and that plaintiff has a statutory and equitable lien on all of said monies, properties and assets to secure the payments thereof.

19

In the alternative, and if for any reason plaintiff be not entitled to recover judgment against the said trustees for the total amount of his claim as aforesaid, then and in such event he alleges and shows unto the court that he is legally and equitably entitled to recover judgment against every and all of the defendants herein such as were stockholders in the Beaumont Export & Import Company at the time of its dissolution to the extent of the monies received and converted by the said respective defendants and stockholders from the monies and assets owned by said company at the time of its dissolution, and that he has a legal and equitable lien against all of said assets owned by said corporation at the time of its dissolution to secure the payment of his claim and judgment. Plaintiff further alleges that the said defendants and stockholders owned shares of stock in said corporation at the time of its dissolution and have received

and converted their respective portions of the monies and assets of said company since its dissolution to the extent of approximately One Hundred Forty Two Thousand Five Hundred Dollars ($142,500.00) proportionately among them as follows:

[fol. 30]

Name of Stockholders	No. of Shares
William Saenger	967
P. P. Butler	460
H. A. Perlstein	208
Clarence A. Miller	2
John F. Pipkin	41
R. M. Mothner	41
Mrs. Janet Smith	5
W. O. Hoffmeyer	5
Mrs. Fannie W. Pogue	2
A. A. Perez	10
R. W. Deshon	55
Wm. Wahrmund	3
Mrs. B. R. Norvell	17
A. M. Kaufman	166
A. M. Kaufman, Trustee	20
John Dollinger, Jr.	62
Mrs. Lucy May Sanders	11
Ray Hoopes	13
W. H. Garretson	143
C. A. Lord	2
D. A. Pruter	52
H. A. Sanders	8

20

Premises considered, plaintiff is entitled to an accurate accounting on the part of the said trustees, and also on the part of all of the said stockholders, showing all of the asests, consisting of either monies or other property on hand and belonging to said Beaumont Export & Import Company from the date of its dissolution; a statement of all of the [fol. 31] properties that have been converted into cash and the amounts thereof; also of all the cash payments or conveyances of properties other than cash to the various stockholders since the dissolution of said corporation; and an accurate statement of all monies and other properties belonging to said corporation coming into the hands of the

said trustees in their capacity as such, or, in the alternative, into the hands and possession of every and all of said stockholders from the date of the dissolution of the corporation to the date of the accounting.

21

Under the statutes of the State of California and the applicable decisions of the courts of last resort of said State, a final judgment rendered by its courts of competent jurisdiction, ipso facto and even though the judgment does not so expressly provide therein, bears interest at the rate of seven per cent from the date of such judgment.

22

The said statutory provisions of the state of California with respect to service in cross actions of copies of pleadings and other instruments, as set out in paragraph 8 of this petition, were at all times herein mentioned applicable both to persons and corporations and were and are reasonable and inherently just, in that, they afforded an opportunity to defendants or adverse parties to be heard and to have "their day in court" and were not in anywise inconsistent with the general canon of jurisprudence requiring that a person or defendant must be offered a hearing before his rights can be affected by judicial action and are in substantial harmony with and in nowise antagonistic to the laws of Texas applicable to the same or like facts and subject matter.

[fol. 32]

23

Under the laws of California the said judgment was not barred by limitation nor was incapable of being otherwise enforced there at the time of the filing of this suit; and under the laws of California and Texas said judgment would not be barred by limitation until the expiration of a period of ten years after the date of the judgment.

24

The statutes of the State of California in force at the time the judgment on the cross action aforesaid was obtained provide, in connection with the statutory provisions

cited and quoted in paragraph 8 of this petition, the following:

Sec. 1015. Service where defendant resides out of State. When a plaintiff or a defendant, who has appeared, resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk or on the justice where there is no clerk, for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except service of subpœnas, of writs and other process issued in the suit, and of papers to bring him into contempt. If the sole attorney for a party is removed or suspended from practice, then the party has no attorney within the meaning of this section. If his sole attorney has no known office in this state, notices and papers may be served by leaving a copy thereof with the clerk of the court or with the justice where there is no clerk, unless such attorney shall have filed in the cause an address of a place at which notices and papers may be served on him, in which event they may be served at such place.

Section 442. Cross-complaint. Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happen- [fol. 33] ing or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint. If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action.

All of the aforementioned statutory provisions of California, to-wit, Sections 442, 1011 and 1015, and the decisions of the courts of last resort of California construing the said statutes, constitute and embrace the law of the instant case applicable to obtaining proper service and giving adequate notice to the opposite party in cross actions, all of which said statutory provisions were in force, valid and binding and applicable hereto at the time said cross

action was filed and at the time the judgment thereon, as aforesaid, was obtained and entered, for that, said original and cross actions related directly to the same contract, transaction, matter and property.

Wherefore, plaintiff prays as follows:

(a) That the said defendants and every and all of them be duly cited to answer this petition and that their names and present addresses are as follows:

William Saenger, Beaumont, Texas.
P. P. Butler, Beaumont, Texas.
H. A. Perlstein, Beaumont, Texas.
Clarence A. Miller, Jefferson County, Texas.
John F. Pipkin, Beaumont, Texas.
[fol. 34] Morris M. Mothner, heir and legal representative of R. M. Mothner, deceased, Beaumont, Texas.
Mrs. Jenet Smith, Jefferson County, Texas.
W. O. Hoffmeyer, Jefferson County, Texas.
Mrs. Fannie W. Pogue, Jefferson County, Texas.
A. A. Perez, Jefferson County, Texas.
R. W. Deshon, Jefferson County, Texas.
Wm. Wahrmund, Beaumont, Texas.
Mrs. B. R. Norvell, Beaumont, Texas.
A. M. Kaufman, Beaumont, Texas.
A. M. Kaufman, Trustee, Beaumont, Texas.
John Dollinger, Jr., Beaumont, Texas.
Mrs. Lucy May Sanders, Jefferson County, Texas.
Ray Hoopes, Beaumont, Texas.
W. H. Garretson, Beaumont, Texas.
C. A. Lord, Beaumont, Texas.
D. A. Pruter, Jefferson County, Texas.
H. A. Sanders, Jefferson County, Texas.

(b) That the said defendants be required to render into court an accurate accounting of all the properties consisting of money and other assets belonging to the said corporation at the date of its dissolution and down to the present time or down to the date of the said accounting, showing an accurate disposition of all of said monies and properties, to what persons the said properties have been paid or conveyed, and showing also every and all of the amounts paid to and received by every and all of said defendants as stockholders in said corporation;

(c) Plaintiff further prays that the said judgment, described in the foregoing petition, rendered and decreed by the said superior court of the state of California be declared and established by this Honorable court to be a valid and binding obligation, originally against the said [fol. 35] Beaumont Export & Import Company, a corporation, and that the said judgment be declared and established by this court, under the "full faith and credit clause" of the constitution of the United States, as a judgment in favor of plaintiff against the said statutory "trustees" of the creditors and stockholders of the said Beaumont Export & Import Company, and against the said trustees, jointly and severally, in their capacity as such; and that the said judgment be declared and established in favor of the plaintiff against the said statutory trustees, both in their capacity as such trustees and against every and all of them personally because of their actual or constructive fraud or negligence in paying out and permitting to be distributed the said monies, properties and funds of the said corporation to and among the said stockholders, instead of first paying the judgment herein sued on and other debts of the said corporation;

(d) Plaintiff further prays judgment against every and all of the aforementioned defendants, such as were stockholders in said corporation and owners af shares thereof at the time of its dissolution and those that have purchased or acquired such shares of stock since its dissolution and have participated in the distribution of the assets of said corporation, and prays that such judgment be entered against every and all of such defendants, jointly, severally and personally; and, in the alternative, plaintiff prays that judgment be rendered against every and all of such defendants and stockholders in the proportion and to the extent that they have received monies and appropriated to their own use and benefit monies, funds and properties of said Beaumont Export & Import Company; and, still in the alternative, plaintiff prays for such judgment herein against the said trustees or against said trustees and the other defendants as stockholders and against any and all of said defendants herein as he may show himself entitled to have, under the pleadings and the evidence;

[fol. 36] (e) Plaintiff further prays that said judgment rendered by said California court for the sum of Five Thou-

sand Dollars ($5,000.00) and costs of court be decreed and established by this court as a judgment for said amount of Five Thousand Dollars ($5,000.00) with interest thereon at seven per cent per annum from the date thereof, as aforesaid, such being the legal rate of interest all judgments bear under the statutes and laws of the State of California, together with all costs of court that have accrued and were incurred in the California court, to-wit, the sum of Four dollars ($4.00) and also all costs of this court;

(f) That the court decree and fix a lien in favor of plaintiff against all of said properties of the said Beaumont Export & Import Company owned at the time of its dissolution, to secure the payment of plaintiff's claim or judgment that may be rendered in his favor; and for judgment foreclosing said lien;

(g) Plaintiff further prays for all such further relief, both general and special, to which he may be entitled in law or in equity.

Howth, Adams & Hart, by M. G. Adams, Attorneys for Plaintiff.

EXHIBIT "A" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

RODOLFO MONTES

Cross Complaint

Now comes Rodolfo Montes, by leave of court first had [fol. 37] and obtained, and files this, his cross-complaint against the plaintiff and cross defendant, and alleges as follows:

I

That the cross-defendant is now, and was at all times hereinafter mentioned, duly organized and existing under the laws of the State of Texas.

II

That heretofore, and on or about the 20th day of June, 1927, cross-complainant was the owner and lawfully possessed of certain goods and chattels of the value of Five Thousand Dollars ($5,000.00), which said goods and chattels are more particularly described as follows:

Item:

(1) 1 Section 31' Special Vermont Back Bar with 6' Cabinet to match refrigerated chamber.
(2) 1 Section 6' Rhode Island Special back bar refrigerated.
(3) 1 Section 31' #63 Cabinet base.
(4) 1 Section 6' Refrigerated base.
(5) 1 Section 37' all white Vitrolite & Mahog. Counter 31' of same for saloon bar and 6' of same for soda fountain.
(6) 2 8'-4" Nickel silver drain board section with shelf extensions in rear as shown on blue print.
(7) 1 Model #206-6' No. 1 Style Soda Fountain Interior with no waste icing system.
(8) 1 8' Rhode Island Luncheonette for steam with 4 jars.
(9) 1 8' Vitrolite Refrigerated counter.
(10) 1 Standard Soda Carbonator.

II

That on or about said day, the cross-defendant unlawfully took and carried away said goods, and converted and disposed of the same to his own use, to the damage of the cross-complainant in the sum of Five Thousand Dollars ($5,000.00).

[fol. 38] Second Cause of Action

For a second, separate and distinct cause of action, cross-complainant adopts paragraphs I and II, as hereinbefore set forth and alleges:

III

That on or about the said 20th day of June, 1927, cross-complainant delivered to cross-defendant the said personal property to be by said cross-defendant safely and securely kept for said cross-complainant, and to be returned and redelivered to the cross-complainant after an inspection

thereof by said cross-defendant, which said cross-defendant then and there promised and undertook to do.

IV

That said cross-defendant did not take due care of, and safely keep, the said personal property for cross-complainant, nor did it, after said inspection, or otherwise or at all, redeliver said personal property to the cross-complainant, but on the contrary cross-defendant so negligently and carelessly conducted itself with respect to the said personal property, and took so little care thereof that by and through the carelessness and negligence and improper conduct of the cross-defendant, its agents and servants, said personal property was wholly lost to the cross-complainant, to his damage in the sum of Five Thousand Dollars ($5,000.00).

Wherefore, cross-complainant demands judgment against cross-defendant in the sum of Five Thousand Dollars ($5,000.00), for costs and all proper relief.

Pelton & Warne, by Clore Warne, Attorneys for Defendant and Cross-Complainant.

[fol. 39] 806 Union Bank Building,
Los Angeles, California.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Rodolfo Montes, being by me first duly sworn, deposes and says; That he is the defendant and cross-complainant in the aboveentitled action; that he had read the foregoing cross-complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

Rodolfo Montes.

Subscribed and sworn to before me this 31 day of October 1932. Edith E. Mallory, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

Filed Nov. 7 P. M. 2:26 1932. L. E. Lampton, County Clerk, by W. L. Greene, Deputy.

EXHIBIT "B" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

RODOLFO MONTES, Defendant and Cross-Complainant

Affidavit of Service of Cross-Complainant and Order Permitting Filing of Cross-Complaint

STATE OF CALIFORNIA,
County of Los Angeles, ss:

W. M. Eggeman being sworn says: I am and was on the dates herein mentioned over the age of eighteen years and not a party to this action: I served the copy of cross-complaint and Order permitting filing of cross-complaint in this action by personally delivering to and leaving with the [fol. 40] following person at the County of Los Angeles on the date set opposite their respective names, a true copy thereof, to-wit:

Richard F. Bailey	Nov. 9, 1932.
by leaving with clerk in office	193-.
	193-.
	W. M. Eggman.

Subscribed and sworn to before me Nov. 10th, 1932.
Edith E. Mallory, Notary Public.

Filed Nov. 12 A. M. 10:28 1932. L. E. Lampton, County Clerk, by F. Zadian Deputy.

EXHIBIT "C" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

RODOLFO MONTES, Defendant and Cross-Complainant

Notice of Motion for Order to Enter Default and for Judgment Upon Cross-Complaint

To the plaintiff and cross-defendant, Beaumont Export and Import Company, a Texas Corporation, and to Messrs. Patterson, Bailey & Montgomery, and to Richard F. Bailey, surviving member of said firm, attorneys for said plaintiff and cross-defendant:

Please Take Notice, that the defendant and cross-complainant, Rodolfo Montes, will on the 20th day of April, 1933, at the hour of 10:00 A. M. of said day, or as soon thereafter as counsel can be heard, in Department 43 of said court, move said court for an order to enter the default of the cross-defendant, Beaumont Export and Import Company, for failure to appear and answer or plead to the cross-complaint of defendant and cross-complainant, Rodolfo Montes, herein filed, and heretofore served upon counsel for said plaintiff and cross-defendant, and for an order that judgment may be entered against said plaintiff and cross-defendant as prayed in the said cross-complaint. Said motion will be made upon the ground that no appearance, or other pleading has been filed to said cross-complaint after due service on attorneys for cross-defendant. [fol. 41] Papers to be used upon said motion will be records, pleadings and files in said action, said cross-complaint and this notice of motion.

Dated this 14th day of April, 1933.

Pelton & Warne, by Clore Warne, Attorneys for Cross-Complainant, 806 Union Bank Building, Los Angeles, California.

Points and Authorities

Service on attorneys for plaintiff of copy of cross-complaint starts running of time for answer, and default may be entered for failure to answer or plead.

Ritter v. Braash, 11 Cal. A. 258; C. C. P. 442, 585.

Received copy of the within Notice of Motion this 15 day of April 1933. R. F. Bailey Attorney for Cross-Defendant.

Filed Apr. 15, 1933. A. M. 11:24. L. E. Lampton, County Clerk, by R. J. Curtis, Deputy.

Exhibit "D" to Petition

In the Superior Court of the State of California in and for the County of Los Angeles

No. 279850

Beaumont Export and Import Company, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

Rodolfo Montes, Defendant and Cross-Complainant

Judgment

Certified Copy Issued: Sep. 18, 1933 (2). Jan. 3, 1934. Jan. 4, 1934. Jun. 22, K1935

[fol. 42] The cross-complainant and defendant, Rodolfo Montes, in the above entitled action having through his attorneys, Pelton & Warne, on the 4th day of May, 1933, before this Honorable Court, in Department 43 thereof, moved for an order to enter default against the said cross-defendant Beaumont Export and Import Company, and for a Judgment thereon, and notice required by law having been duly given to the said cross-defendant Beaumont Export and Import Company, and the court being fully advised in the premises and having examined the files.

It is Therefore Ordered Decreed and Adjudged

That Rodolfo Montes, cross-complainant, have and recover Judgment against the Beaumont Export and Import

Company, a Texas corporation, cross-defendant, for the sum of Five Thousand Dollars ($5,000.00) and costs in the sum of $—.

Dated May 24, 1933.

Douglas L. Edmonds, Judge.

Filed May 25, 1933. Typed by F. V. Merchant. Entered May 31, 1933. L. E. Lampson, County Clerk, by L. Washburn Deputy. (Book 867, Page 262.) Assignment to Consuelo H. De Montes, filed 6/8/1933. Assignment to Esteban Adam, filed Sep. 20, 1933. Attest 9/21/33.

[fol. 43] EXHIBIT "E" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-Defendant

vs.

RODOLFO MONTES, Defendant and Cross-Complainant

Judgment of Dismissal

Certified Copy Issued Mar. 5, 1935

Upon the ex parte motion of the above named defendant, for the judgment of this court dismissing the complaint of the plaintiff in the above entitled action, the court being fully apprised of the premises, and it appearing to the court that there has been an unexcusable delay of more than five years after the filing of the defendant's answer in prosecuting the said action.

It is therefore Ordered, Adjudged and Decreed that the complaint in the above entitled action be and the same is hereby dismissed, and that the defendant have and recover from the plaintiff herein his costs and disbursements incurred in this action, amounting to the sum of $4.00.

Dated Jan. 31st, 1935.

Harry R. Archbald, Acting Presiding Judge.

Filed Jan. 31, 1935. Typed by E. E. Cohn. Entered Feb. 2, 1935. L. E. Lampton, County Clerk, by I. Bottomley Deputy. (Book 897, Page 313.)

[fol. 44] EXHIBIT "F" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation,

vs.

RODOLFO MONTES, Defendant and Cross-Complainant

Notice of Entry of Judgment

To the plaintiff and cross-defendant above named and to Messrs. Patterson, Bailey & Montgomery and Richard F. Bailey, Esq., its attorneys:

Please Take Notice that judgment heretofore rendered and made in favor of cross-complainant and against plaintiff and cross-defendant was entered by the clerk of said court on the 31st day of May, 1933, in Book 867, at page 262 of Judgments in the office of the clerk of said court.

Dated this 6th day of September, 1933.

Pelton & Warne, by Clore Warne, Attorneys for Defendant and Cross-Complainant.

Received copy of the within notice of Entry of Judgment this 8th day of September, 1933, A. M. 10:29. R. F. Bailey by Holder, Attorney for Plaintiff and Cross-Defendant.

Filed Sep. 8, 1933. L. E. Lampton, County Clerk, by R. J. Curtis, Deputy.

EXHIBIT "G" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff,

vs.

RODOLFO MONTES, Defendant

Notice of Motion to Set Aside Default

[fol. 45] To Clore Warne and to Pelton, Warne and Balter, Attorneys for the aboved named defendant and cross-complainant:

You and each of you will please take notice that on the 23rd day of November, 1933, at 10 o'clock A. M. on said

date, or as soon thereafter as said matter can be heard in the courtroom of Department 43 of the above entitled court, 18th Floor of the city Hall, plaintiff and cross-defendant, Beaumont Export and Import Company, a Texas Corporation, will move said court for its order setting aside the default entered herein on the 24th day of May, 1933, and permitting plaintiff and cross-defendant to file its answer, served herewith.

Said motion will be made on the following grounds, to-wit: That said judgment was entered against said plaintiff and cross-defendant through the mistake, inadvertance, surprise or excusable neglect of plaintiff's and cross-defendant's counsel.

That said motion will be based upon this notice, the affidavits of Richard F. Bailey, Lucile Holder, and Adolph Levy, filed herewith, and upon the answer, duly verified, of plaintiff and cross-defendant, each and all of shich said documents are attached hereto, and upon all of the other pleadings, documents, records and files in the above entitled and numbered matter.

Dated, Los Angeles, California, this 15th day of November, 1933.

Richard F. Bailey, Attorney for Plaintiff and Cross-Defendant.

Received Nov. 16, 1933. Pelton, Warne & Balter, by Tanner.

Filed Nov. 17, 1933, P. M. 4:19. L. E. Lampton, County Clerk, by R. J. Curtis, Deputy.

[fol. 46] EXHIBIT "H" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff,

vs.

RODOLFO MONTES, Defendant

Affidavit on Motion to Set Aside Default Judgment on Cross-Complainant

STATE OF CALIFORNIA,
County of Los Angeles:

Richard F. Bailey, first being by me duly sworn, upon his oath deposes and says: That he is one of the attorneys

of record of plaintiff and cross-defendant in said above-numbered and entitled cause; that said action was filed originally in the early part of 1929; that an amended complaint was filed on July 18th, 1929; that an answer thereto was filed on August 22nd, 1929; that an amendment to the answer by said defendant and cross-complainant, setting up a plea in abatement, was filed on October 19th, 1929; that an order permitting the filing of a cross-complaint was entered on November 7th, 1932; that it appears from the record that an affidavit of service, sworn to by one, William Eggerman; that said cross-complaint was served on affiant "by leaving same with clerk in office" on November 9, 1932; that thereafter a notice of motion for order to enter default was served and said motion bears what purports to be affiant's signature; that said notice of motion purports to have been served April 15th, 1933; that in truth and in fact the signature upon said document is not affiant's signature and affiant did not authorize the signing [fol. 47] thereof and knew nothing about the signing thereof until an examination of said record on or about September 12th, 1933; that on said 8th day of September, 1933, notice of entry of judgment on said cross-complaint was served upon affiant by serving affiant's secretary and that said notice of entry of judgment was the first notice or knowledge of any kind that affiant had that said cross-complaint had been filed and/or said judgment by default thereon entered.

That affiant had no clerk on the 9th day of November, 1932, and affiant has questioned both affiant's secretary, to-wit Lucile Holder, and an attorney associated with affiant at said time, to-wit, Adolph Levy, and each of the said parties states that said cross-complainant was not served upon them or either of them; that said two parties were the only parties authorized by affiant to sign papers for affiant and neither of said parties signed said notice of motion to enter default, which purported to bear affiant's signature as of date April 15th, 1933.

That affiant knew nothing about the filing of said cross-complaint or the entry of judgment thereon or of any matters pertaining thereto until after the service of said notice of entry of judgment on or about September 8th, 1933. That since that time to date hereof, affiant has made diligent search of affiant's files and has talked with each and every person associated in the suite of offices with affiant

and none of said persons has any knowledge or notice of either the serving of said cross-complaint or of the motion to enter default purporting to bear affiant's signature; that the plaintiff and cross-defendant has a meritorious defense to said cross-complaint as appears from the proposed answer of said plaintiff and cross-defendant attached hereto and served contemporaneously herewith.

Richard F. Bailey.

[fol. 48] Subscribed and sworn to before me this 1st 17th day of November, 1933. N. Kelso, Notary Public in and for Said County and State. (Seal.)

EXHIBIT "I" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-defendant,

vs.

RODOLFO MONTES, Defendant and Cross-Plaintiff

Affidavit of Adolph H. Levy

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Adolph H. Levy, being by me duly sworn, upon his oath deposes and says:

That affiant is an attorney at law duly licensed to practice law in the State of California, and has been practicing in the city of Los Angeles for the last several years past; that for some time prior to November 9, 1932, and continuously thereafter until Subsequent to April 15, 1933, affiant was associated as an attorney with Richard F. Bailey in the practice of law with Richard F. Bailey, at 808 Quinby Building, Los Angeles, California; that to affiant's knowledge the said Richard F. Bailey had no other person associated with or employed by him either as an attorney or as a clerk during any of said period above mentioned; that affiant attended to all matters of a legal nature of the said

Richard F. Bailey during the said Richard F. Bailey's absence from the office; that affiant was not served with [fol. 49] and knew nothing about a certain "Notice of Motion for Order to Enter Default and for judgment upon cross-complaint" filed in said above numbered and entitled action, which was purportedly signed by Richard F. Bailey; that affiant had no notice or knowledge of any kind of an order permitting the filing of a cross-complaint purportedly served "by leaving with the clerk in the office" of the said Richard F. Bailey on November 9, 1932; that affiant has never seen and knew nothing about either of said documents at any time until the same was mentioned and brought to the attention of affiant by the said Richard F. Bailey, within the past two or three weeks.

Further affiant sayeth not.

Dated at Los Angeles, California, this 15th day of November, 1933.

Adolph H. Levy.

Subscribed and sworn to before me, this 15th day of November, 1933. Edna Taft, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

EXHIBIT "J" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

RODOLFO MONTES, Defendant and Cross-Plaintiff

Affidavit of Lucille Holder

[fol. 50] STATE OF CALIFORNIA,
County of Los Angeles, ss:

Lucille Holder, being be me first duly sworn, upon her oath deposes and says:

That she as Secretary of Richard F. Bailey for several years prior to April 1, 1933; that since leaving the employ

of Richard F. Bailey affiant has at times been employed by Robert M. Pease, associated in the same office suite with Richard F. Bailey.

That the said Richard F. Bailey has called to affiant's attention statement in the affidavit of one William Eggerman that the cross-complaint in said above entitled and numbered cause was served upon the said Richard F. Bailey "by leaving with clerk in office" on November 9, 1932; that affiant has no recollection of said cross-complaint having been left with her or served upon the said Richard F. Bailey at any time; that affiant has no recollection of whether or not the notice of motion for order to enter default was served upon Richard F. Bailey through her; that affiant has made a diligent search of all the files of the said Richard F. Bailey but has been unable to locate said two documents or either of them or a copy of said documents or any notation upon the records of said office as to the service of said documents or either of them.

Dated at Los Angeles, California, November 15, 1933.

Lucille Holder.

Subscribed and sworn to before me this 15th day of Nov. 1933. Edna Taft, Notary Public in and for said Co. and State. (Seal.)

Received Nov. 16, 1933. Pelton, Warne & Balter, by Tanner.

Filed Nov. 17, P. M. 4:21, 1933. L. E. Lampton, County Clerk, by R. J. Curtis, Deputy.

[fol. 51] EXHIBIT "K" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

RODOLFO MONTES, Defendant and Cross-Complainant

Answer to Cross-Complaint

Comes now the plaintiff and cross-defendant in the above entitled action and in answer to said cross-complaint admits, denies and alleges, as follows:

As to First Cause of Action:

I

Admits paragraph I.

II

Denies each and every allegation of said paragraph II of said cross-complaint and says that the same is not true in whole or in part and demands strict proof thereof; and plaintiff further alleges that such possession, if any it had, of certain items or either or any of them mentioned in said paragraph II was with the consent and approval of said cross-complainant and was not on said 20th day of June, 1927, or at any other time mentioned in said cross-complaint, or any date subsequent thereto, owned or possessed by said cross complainant.

III

This cross-defendant denies each and every allegation [fol. 52] contained in the second numbered paragraph II and says that the same is not true in whole or in part and demands strict proof thereof.

As to Second Cause of Action:

I

This cross-defendant re-alleges its answer to paragraphs I and II of said first cause of action and adopts the same as though fully set forth herein.

II

Denies each and every allegation set forth in paragraph III in said second cause of action in said cross-complaint

and says that the same is not true in whole or in part and demands strict proof thereof.

III

This cross-defendant denies each and every allegation contained in paragraph IV of said second cause of action and says that the same is not true in whole or in part and demands strict proof thereof, and this cross-defendant further alleges that if it at any time had possession of said property described in said cross-complaint, or any part thereof, said possession was fairly and voluntarily given by said cross-complainant and was unqualified and absolute and with the full consent of said cross-complainant.

Wherefore, this said cross-defendant prays judgment of the court that cross-complainant take nothing by his suit and that this cross-defendant recover all of its costs in its behalf expended.

Richard F. Bailey, Attorney for Cross-Defendant.

[fol. 53] STATE OF CALIFORNIA,
County of Los Angeles, ss:

Richard F. Bailey, being first duly sworn, deposes and says: That he is the attorney of record for the Beaumont Export and Import Company, a Texas Corporation; that there is no officer, director or agent of said corporation in the State of California; that he verifies this Answer to Cross-complaint on behalf of said Beaumont Export and Import Company, a Texas Corporation; that he has read the foregoing Answer and knows the contents thereof and that the same is true of his own knowledge, except as to matters and facts therein stated upon his information or belief, and that as to such matters he believes them to be true.

Richard F. Bailey.

Subscribed and sworn to before me this 13th day of November, 1933. Edna Taft, Notary Public in and for Said County and State. My commission expires March 8, 1935. (Seal.)

(Second Verification.)

Received Nov. 16, 1933. Pelton, Warne & Balter, by Tanner.

Filed Nov. 17, P. M. 4:22, 1933. L. E. Lampton, County Clerk, by R. J. Curtis, Deputy.

EXHIBIT "L" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

[fol. 54] No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

RODOLFO MONTES, Defendant and Cross-Complainant

Affidavit of W. M. Eggeman in Opposition to Motion to Vacate Default

STATE OF CALIFORNIA,
County of Los Angeles, ss:

W. M. Eggeman, being sworn, states:

That he is a citizen of the United States over the age of 18 years, and not a party to the above entitled action, and that for a number of years past, he has followed the occupation of process server, serving legal and court documents in the City and County of Los Angeles, and is familiar with methods commonly and ordinarily used in effecting service.

That affiant recalls being given certain documents for service upon Messrs. Patterson, Bailey & Montgomery, whose office was designated in the Great Republic Life Building; that at the time said documents were handed to affiant for service there was delivered to him a pink memorandum, original of which is attached to the original of this affidavit, and that affiant has used said document for the purpose of refreshing his recol-ection in the making of this affidavit.

That affiant recalls that he went to the Great Republic Life Building and learned that Messrs. Patterson, Bailey and Montgomery no longer maintained an office in such building and was informed by someone of whom affiant inquired that Messrs. Patterson, Bailey & Montgomery were [fol. 55] a law firm in the Title Guarantee Building and that they had moved from the said Great Republic Life Building; that affiant thereupon went to the Title Guarantee Building, at room 810 and inquired of someone relative

to accepting service of the documents which he had for service, and that he was then and there informed by someone there that this was a case of a client of Mr. Bailey, a former member of the firm of Patterson, Bailey & Montgomery who had an office at 808 Quinby Building, and that thereupon and on said day, affiant went to said office in the Quinby Building and inquired for said Richard F. Bailey and was informed that said Richard F. Bailey was not there, but that it was his office and that affiant delivered the copies of said documents to a male person in said office apparently over the age of 18 years, who appeared to be a clerk or office employee in said office, the same being delivered for said Bailey; that thereafter affiant made an affidavit of service of said domuments and filed the same in the office of the clerk of this court.

That thereafter, to-wit, on the 15th day of April, 1933, there was delivered to affiant by the office of Pelton, Warne & Balter, an original and copy of notice of motion for order to enter default, together with a pink memorandum directed to affiant that he serve copy of the same on Richard F. Bailey; that affiant took the copy of said notice together with the original to the office of said Bailey on said 15th day of April, and delivered the same to an office attendant with the statement that there were delivered for service upon Mr. Bailey and that said office attendant then and there procured a signature upon the original of said notice of motion and returned said original to affiant, and that the copy of service was left in said office in said Quinby Building; and that thereafter affiant filed the original of said notice of motion in the office of the clerk of this court. [fol. 56] That the pencil notations on the pink memoranda filed as a part of this affidavit were made by affiant at the time of performance of the acts as hereinabove related.

That affiant has examined the 1933 directory of attorneys issued by Parker, Stone & Baird, and funds listed in the said directory on page 77 thereof the name "Patterson & Montgomery, 810 Title Guarantee Building, Trinity 420 5."

W. M. Eggeman.

Subscribed and sworn to before me this 23rd day of November, 1933. Edith E. Mallory, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

Received copy of the within Affidavit of W. M. Eggeman in opposition to motion to vacate default this 29th day of November, 1933. R. F. Bailey, per L. R. Watters, Attorney for Plaintiff and cross-defendant.

Received copy of the within Affidavit this 29th day of November, 1933. —— ——, Attorney for —— ——.

Filed Nov. 29, A. M. 10:23, 1933. L. E. Lampton, County Clerk, by E. T. Crozier, Deputy.

EXHIBIT "M" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

RODOLFO MONTES, Defendant and Cross-Complainant

Affidavit of Clore Warne in Opposition to Motion to Set Aside Default Judgment

[fol. 57] STATE OF CALIFORNIA,
County of Los Angeles, ss:

Clore Warne, being sworn, states:

That he is one of the attorneys for the defendant and cross-complainant, and he is familiar with certain of the proceedings had and taken herein.

That heretofore, to-wit, on or about the 7th day of November, 1932, affiant presented to the presiding Judge of this court, Hon. Harry A. Archbald, verified form of cross-complaint together with affidavit of affiant in support of application for leave to file the same, and made application for, and received leave to, by order of said court then and there made to file said cross-complaint, and that said cross-complaint was thereupon filed in conformity with said order.

That thereafter affiant directed that service be made of a copy of said cross-complaint, affidavit of filing and order upon Messrs. Patterson, Bailey & Montgomery, the attor-

neys who had appeared of record for plaintiff and cross-complainant, and directed that such service be made by W. M. Eggeman, who then did, and for some time theretofore had, served process, legal and court papers for the office of affiant; and that thereafter as affiant is informed and believes and therefore alleges, service was made by said W. M. Eggeman on the office of said Bailey at 808 Quinby Building, on the 9th day of November, 1932, all as will appear more fully by the affidavit of said W. M. Eggeman herein filed.

That thereafter, to-wit, on the 15th day of April, 1933, affiant directed that a certain notice of motion for order to enter default and for judgment upon cross-complaint, which said notice of motion is dated April 14th, 1933, be served [fol. 58] upon the said Richard F. Bailey and that thereafter, as affiant is informed and believes and therefore alleges, a copy of said notice of motion was delivered to the office of said Richard F. Bailey in the said Quinby Building, and that a receipt for service was given and made upon the original by some person purporting to be, or having the authority to represent, the said Richard F. Bailey, and that thereafter said original notice of motion was filed in the usual course with the clerk of said superior court.

That thereafter, pursuant to said notice of motion, the same came on for hearing on the 20th day of April, 1933, in Department 43 of said court, and that affiant appeared as the attorney for the cross-complainant and the maker of said motion, and that when it appeared to affiant that no counsel was present representing the plaintiff and cross-defendant, affiant stated to the court that there might have been some misunderstanding on the part of Mr. Bailey as the surviving member of the firm of Patterson, Bailey & Montgomery, and asked the judge then presiding to hold the matter until he could telephone to said Bailey; that affiant thereupon from the courthouse called the office of said Bailey and was informed by said Bailey that the matter had been overlooked on his calendar and he would appreciate it being continued for one week and that he, said Bailey, would check the matter and call affiant back on the Monday next following, and that affiant then and there next made a pencil notation on the office copy of affiant's notice of motion to the effect as follows: 4-20-33 continued to May 4. Called Bailey, said he would call me Monday. That

thereupon affiant asked said court to continue said matter until the 4th day of May, 1933 and that such order was entered.

That thereafter, affiant not having heard further from said Bailey, on the 4th day of May, 1933, affiant called said [fol. 59] Bailey on the telephone and asked him if he was ready to proceed with the hearing on said motion, and that said Bailey stated to affiant that he was engaged or about to be engaged in a jury trial and in addition he had written to his company, the plaintiff in the action, and would like to await reply from them, and that he would appreciate having the matter go over to and until May 17th, 1933, and that affiant stated that he would be glad to accommodate said Bailey and would arrange for such continuance; and that thereafter affiant called the clerk in Department 43 and arranged with said clerk to have said matter continued for hearing to and until the 17th day of May, 1933 at 10:00 A. M. or as called on the calendar of said court; and that thereupon and to confirm said telephone conversation affiant dictated a letter to said Bailey and when the original of said letter was transcribed, he signed the same and deposited with his Secretary for mailing in the usual course of business and is informed and believes and therefore alleges that said letter was mailed to said Bailey on said 4th day of May, 1933, with sufficient postage thereon to insure delivery, and that a yellow carbon of said letter was placed in the files in said matter in the office of affiant, and copy of which said letter is in words and figures as follows:

"May 4th, 1933.

Richard F. Bailey, Esq., 808 Quinby Building, Los Angeles, California.

DEAR SIR:

Re Beaumont Export & Import Co. vs. Rodolfo Montes

In the above entitled matter, in agreement with my telephone conversation with you of this day, I have had the hearing on our motion to enter default and for judgment [fol. 60] continued until May 17th at 10:00 A. M. It will be called in Department 43 at that time.

In the meantime, if you hear from your company, I will be pleased to have you communicate with me relative to this motion.

Trusting this is satisfactory, I am,

Yours truly, Clore Warne. *Of-* Pelton, Warne & Balter."

CW. L.

Affiant further states and alleges that in the office of Pelton, Warne & Balter at said time, to-wit, on the 4th day of May, 1933 all telephone calls during regular business hours were handled through a switchboard with an operator who then and there kept a record of the calls made, by whom said calls were placed, and the name of the person called together with the number called and that the telephone records of outgoing telephone calls on said 4th day of May, contains in part the following record:

"Outgoing Telephone Calls

Day, 4th. Month, May. Year, 1933

Calling	Name	Number
H. B.	.....	.....
C. W.	Koenig	Tr. 5135
H.B.	Standberry	Mi. 1207
C. W.	Bailey	Tr. 2087
"	"	Tu. 7956
"	Hart	Mu. 0211
"	43	Mi. 9211"

(That for the purpose of deciphering the symbols thereon, the initials "C. W." indicate affiant as the person calling and the initials "H. B." indicate another person in the office and the numeral 43 indicates or purports to indicate a department in the Superior Court called. That a translation of said symbols and data indicates that affiant [fol. 61] called said Bailey or that a call was placed for him at Trinity 2087 and thereafter a call was placed for such Bailey at Tucker 7956 and that thereafter a call was placed for affiant with the clerk of Dept. 43 of the Superior Court.)

Affiant further notes that upon the 1933 directory of attorneys for the City of Los Angeles, published by Parker,

Stone & Baird, Checked by the telephone operator for the purpose of her assistance in making telephone calls there appears in the particular copy kept by said telephone operator on P. 21, the printed named, address and telephone number of said Bailey in words and figures as follows: "Bailey, Richard F., 808 Quinby Building, Trinity 2087." that immediately to the right in pencil notations there appears the following: "Tu. 7956." That affiant notes that the present telephone number of said Richard F. Bailey as noted upon the moving papers in this notice of motion to set aside default is "Tucker 7956."

That thereafter, affiant did not hear from said Bailey further and appeared in Department 43 and presented the motion of defendant and cross-complainant, and that thereupon the court made an order that said motion should be granted, all as will more fully appear from the notice of motion, records and minutes of said court as the same appear in the office of the clerk thereof in said file and proceedings, to which said records and files reference is hereby made.

That affiant has read the affidavit of Richard F. Bailey, subscribed and sworn to on the 11th day of November, 1933, and alleges the fact to be that it is not true that the first notice or knowledge which came to said Bailey of the filing of said cross-complaint was on the 8th day of September, 1933, and that it is not true that affiant knew nothing about [fol. 62] the filing of said cross-complaint or of any matters pertaining thereto until after the service of said notice of entry of judgment on or about September 8th, 1933. On the contrary, affiant alleges that the communications had with Bailey as aforesaid, said Bailey was advised that a cross-complaint had been filed by defendant and cross-complainant and in such conversations he stated that he had knowledge of said motion by reason of the notice theretofore served upon and desired certain additional time, all as will more fully hereinbefore appear.

That affiant calls attention to the fact that the proposed answer to cross-complaint offered in support of said motion is verified by Richard F. Bailey as the "attorney for plaintiff and cross-defendant", and that said answer to cross-complaint contains direct denials of the material allegations of said cross-comlpaint; that affiant is informed and believes and therefore alleges that said Richard F. Bailey has no direct knowledge of the matters and things alleged and set

forth in said cross-complaint and has no knowledge sufficient to enable him to verify said answer to cross-complaint and the allegations and denials therein contained as of his "own knowledge", and that in this regard affiant is informed and believes and therefore alleges the fact to be that the chattels in said cross-complaint referred to were converted by the plaintiff and cross-defendant at and in the City of Mexico, Republic of Mexico, and that all the facts and circumstances happened and took place in said city of Mexico.

Affiant further states that the default in said action was not entered, because of, or as the result of any mistake, inadvertence, surprise or excusable neglect of plaintiff's and cross-defendant's counsel.

Clore Warne.

[fol. 63] Subscribed and sworn to before me this 28th day of November, 1933. Edith E. Mallory, Notary Public in and for the county of Los Angeles, State of California. (Seal.)

Filed Nov. 29, A. M. 10:23, 1933. L. E. Lampton, County Clerk, by E. T. Crozier, Deputy.

Received copy of the within affidavit of Clore Warne, etc., this 29th day of November, 1933. R. F. Bailey, per L. R. Watters, Attorney for plaintiff and cross-deft.

EXHIBIT "N" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation, Plaintiff and Cross-defendant,

vs.

RODOLFO MONTES, Defendant and Cross-Complainant

Counter Affidavit of Richard F. Bailey

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Richard F. Bailey, being sworn states: that affiant has checked the records of his office and daily calendar and finds

no record of any conversation had with one Clore Warne, as set forth in the said Clore Warne's affidavit in opposition [fol. 64] to the motion on file hereon. That affiant has no recollection of any such conversation or of any conversation with the said Clore Warne upon said 20th day of April, 1933, pertaining to the subject mentioned in said affidavit, and to the best of affiant's belief, no such conversation was engaged in between affiant and the said Warne on or about said date, or on any other date, pertaining to said subject;

That as regards said alleged conversation of May 4th, 1933, affiant's calendar shows on said May 4th, 1933, a notation as follows: "Re San Pedro Matter"; that to affiant's best recollection on said 4th day of May, 1933, affiant was in the City of San Pedro the entire day on business for one A. Grove Knutsen and that affiant was not in affiant's office on said date; that affiant's calendar for several days prior to May 4th, 1933 and at least six days thereafter shows no record of a jury or other trial matter; that as regards said purported letter, a copy of which is set forth in paragraph 4 of the said Warne's affidavit, the files of affiant reflect the receipt of no such letter and affiant has no recollection and therefore believes that no such letter, if posted, was ever received by affiant.

That affiant re-affirms the statements in affiant's said original affidavit as regards the first notice or knowledge of any kind this said affiant had of the entry of said judgment or of the filing of the said cross-complaint.

That as regards the statement in said Warne's affidavit that affiant had no knowledge of the matters and things set forth in said answer accompanying said motion, affiant states that said information was obtained by said affiant in two telephone conversations with the attorney for said plaintiff at Beaumont, Texas, and each and every of said allegations in said answer are based upon the information furnished directly to affiant by said attorney for said plaintiff in Beaumont, Texas, and affiant believes that said [fol. 65] allegations are true and that said plaintiff has a good, sufficient and meritorious defense to said cross-complaint, as set forth in said answer.

That since reading the affidavit of W. M. Eggerman, affiant has made inquiry of the lawyers associated with said affiant and of each and every attendant and office employee and has thoroughly checked or caused to be checked the office files of each and every attorney connected with said

office and affiant has been unable to locate said documents mentioned as having been delivered to the office of affiant by the said W. M. Eggerman and has failed to locate, after diligent search, any record of the receipt of either of said two documents; and affiant further states that this affiant has been practicing law actively in the City of Los Angeles for more than ten years continuously last past and that this is the first occasion upon which this affiant has ever been called upon to present in that entire period of time a motion to set aside a judgment of default under Section 473; that this affiant has at all times been careful to note the receipt of all pleadings requiring an answer and of the date that said answer was required or action required to be taken, and that affiant truly believes that, if either of said documents came to affiant's attention, or if said conversation as alleged took place, this affiant would remember it; that on the contrary this said affiant has no recollections whatsoever of having had a conversation or conversations, as set forth in said Warne's affidavit, and has no recollection whatever of ever having seen said documents, or either of them, at any time prior to the time set forth in affiant's said original affidavit.

Richard F. Bailey.

Subscribed and sworn to before me this 7th day of December, 1933. Edna Taft, Notary Public in and for Said County and State. (Seal.)

[fol. 66] Received copy of the within Affidavit this 11th day of December, 1933. Pelton & Warne, by C. Warne, Attorney for Defendant.

Filed Dec. 13, P. M. 3:00, 1933. L. E. Lampton, County Clerk, by E. T. Crozier, Deputy.

Exhibit "O" to Petition

In the Superior Court of the State of California in and for the County of Los Angeles

No. 279850

Beaumont Export and Import Company, a Texas Corporation, Plaintiff and Cross-Defendant,

vs.

Rodolfo Montes, Defendant and Cross-Complainant

Affidavit of Clore Warne on Motion to Dismiss

State of California,
County of Los Angeles, ss:

Clore Warne, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendant, and he is familiar with all of the proceedings had and taken herein.

That a copy of the summons and complaint in the above entitled action was served on June 1, 1929, on the defendant Rodolfo Montes and thereupon the same was brought to your affiant to make proper answer or plead thereto; that thereafter on June 6, 1929, a stipulation was entered into between counsel for the parties hereto, extending the time within which the defendant could appear in the above action. That on or about the 12th day of July, 1929, a demurrer having been interposed to the complaint above referred to, the same was sustained and the plaintiff required to amend its complaint. That on July 18, 1929, an [fol. 67] amended complaint was served on your affiant and on or about the 22nd day of August, 1929, an answer was served and filed for and on behalf of the above defendant. Subsequent thereto a stipulation having been entered into between counsel for the parties hereto, an amendment to the said answer was served and filed on October 19, 1929, and the said cause has been at issue and ready for trial since the said 19th day of October, 1929; that no motion or proceeding whatsoever has been made or taken by plaintiff, or at all, to set said cause for trial, nor have any further steps or proceedings been taken by

the plaintiff since the said 19th day of October, 1929, to prosecute the said cause.

That the defendant has been at all times since October 19, 1929, ready to try said cause and that plaintiff's delay to bring said cause to trial is wholly unexcusable and not caused by any act or acts or omission of defendant or his counsel. That there is no stipulation entered into between the parties hereto extending the time within which the trial of the within cause may be had.

Clore Warne.

Subscribed and sworn to before me this 29th day of January, 1935. Edith E. Mallory, Notary Public in and for the said County and State. (Seal.)

Filed Jan. 31, 1935. L. E. Lampton, County Clerk, by Jay E. Davis, Deputy.

EXHIBIT "P" TO PETITION

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

December 12, 1933.

Present Hon. Lester Wm. Roth, Judge

[fol. 68] Department 43

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, ETC., Plaintiff,

vs.

RODOLFO MONTES, Defendant

Motion to set aside default and file answer comes on for hearing, R. F. Bailey appearing as attorney for plaintiff and Pelton & Warne for Defendant; said motion is denied.

I certify the foregoing to be a full, true and correct copy of an order entered on the minutes of said Superior court.

Exhibit "Q" to Petition

Superior Court Los Angeles County

No. 279850

Beaumont Export & Import Co., Plaintiff,

—

Rodolfo Montes, Defendant

Patterson, Bailey & Montgomery, Attorney for Plaintiff.
Pacht, Pelton & Warne, Attorney for Defendant.
Nature of Action: Goods, Wares and Merchandise.

Year	Month	Day	Proceedings	Reporter	Dept. No.	Judgment Book Page	Fees
1929,	May	31.	Complaint filed—Summons issued. Aff and Bon on Attcht filed Surety: Fidelity and Deposit Company of Maryland Amount: $1600.00—Writ Issued				7
	Jun.	12.	Sums filed				
	"	13.	Writ of Attcht filed				
	"	24.	Dem of Deft filed Pacht, Pelton & Warne				2
	"	24.	Notice that Security for costs required filed				
	"	27.	Non Resident Bond for costs filed Fidelity & Deposit Co. of Md. Sureties $300				
[fol. 69]							
	"	28.	Dem contd July 12		Dept. 7		
	July	12.	Dem sustained—10 days		Dept. 7		
	"	19.	Amd. Comp filed				
	"	29.	Dem to and comp filed				
	Aug.	2.	Dem to amend. cop. sustained as to first cause and overruled as to third cause—10 days		Dept. 20		
	"	22.	Ans. to amed comp filed				
	Oct.	19.	Amdt to ans of deft filed				
	Nov.	7.	Order permitting filing of x comp & aff thereon filed				
	"	7.	Cross comp filed				
1932,	Nov.	12.	Aff of service filed				
1933,	Apr.	15.	No of motion Apr. 20–10 A. M. for ord. to enter default, etx. filed		Dept. 43		
	"	20.	cont. to May 4		D 43		
	May	4.	cont. to May 17		D 43		
	"	17.	Motion granted		D 43		
	"	25.	Judgt filed		D 43		
	"	31.	Judgment entered			867; 262	
	"	31.	Judgment docketed				
	Jun.	1.	Judgment Roll filed				
	"	8.	Assignment of Jugt by Rudolfo Montes to Consuelo H. de Montes filed				
	Sep.	8.	No of entry of judgt filed				
	"	20.	Assignment of judgment to Esteban Adam filed				
	Nov.	17.	Not of Mo to set aside default Nov. 23–10 A. M. Dept. 43 filed				
	"	17.	Aff Supporting motion filed				

Proceedings				Book Page	
Year	Month	Day	Reporter	Dept. No. Judgment	Fees
1933,	Nov.	17.	Proposed Ans. filed		
	"	23.	Mo to set aside default contd to Dec 10	D 43	
[fol. 70]					
	"	29.	Aff of Clore Warne filed		
	"	29.	Aff of W. M. Egglman filed		
	Dec.	1.	Mo. to set aside default contd to Dec. 7	D 43	
	"	7.	Motion cont to Dec. 12	D 43	
	"	12.	Mo. to set aside default denied	D 43	
	"	13.	Counter Aff of R. F. Bailey filed		
1935,	Jan.	31.	Aff of Clore Warne on motion to dismiss filed		
	"	31.	Judgment of dismissal filed		
	"	31.	Memo. of costs filed		
	Feb.	2.	Judgment entered		897; 313
	"	2.	Judgment docketed		
	"	4.	Judgment Roll filed		

EXHIBIT "R" TO PETITION

No. 279850

BEAUMONT EXPORT AND IMPORT COMPANY, a Texas Corporation,

vs.

RODOLFO MONTES

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, L. E. Lampton, County Clerk of the county of Los Angeles, State of California, and ex-officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, do hereby certify and attest the foregoing to a full, true and correct copy of the original complaint, Summons issued May 31, 1929, Demurrer to complaint, Notice that Security for costs is required, Amended Complaint, Demurrer to Amended Complaint, Answer to Amended Complaint, Amendment to Answer to Amended Complaint, Order permitting filing of cross complaint including affidavit in support thereof, Cross Complaint, Affidavit of Service of Cross Complaint, Notice of Motion for order to enter default and for judgment upon cross Complaint, Judgment (Book 867, page 262), Assignment of Judgment (filed Jun. 8, 1933), Notice of entry of judgment, Assignment of Judgment (filed Sep. 20, 1933),

Notice of Motion to set aside default, Affidavits (3) in support of motion to set aside default judgment, proposed Answer to Cross Complaint, Affidavit of W. M. Eggeman in [fol. 71] opposition to motion to vacate default, Affidavit of Clore Warne in opposition to Motion to set aside default judgment, Counter Affidavit of Richard F. Bailey as to default judgment, Affidavit of Clore Warne on motion to dismiss, and jurgment of Dismisal (Book 897, page 313), on file in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and annexed the seal of the Superior court of the State of California, in and for the County of Los Angeles, this 27th day of June, 1935.

L. E. Lampton, County Clerk of the County of Los Angeles, State of California, and ex-Officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles. (Seal.)

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, Edward T. Bishop, Judge of the Superior Court of the State of California, in and for the county of Los Angeles, do hereby certify that L. E. Lampton is County Clerk of the County of Los Angeles, State of California, and ex-officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles (which court is a court of Record, having a seal); that the signature to the foregoing certificate and attestation is the genuine signature of the said L. E. Lampton as such officer; that the seal annexed thereto is the seal of said Superior Court; that said L. E. Lampton, as such clerk, is the proper officer to execute the said certificate and attestation, and that such attestation is in due form according to the laws of the State of California.

In Witness Whereof, I have hereunto set my hand in my [fol. 72] official character as such judge, at the city of Los Angeles, County and State aforesaid, this 27th day of June, A. D. 1935.

Edward F. Bishop, Judge of the Superior Court of the State of California, in and for the County of Los Angeles.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, L. E. Lampton, County Clerk of the County of Los Angeles, State of California, and ex-officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles (which court is a court of Record, having a seal which is annexed hereto) do hereby certify that Edward T. Bishop whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Judge of the Superior Court aforesaid, and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In Witness Whereof, I have hereunto set my hand and annexed the seal of the Superior Court, at my office in said County, this 27th day of June, A. D. 1935.

L. E. Lampton, County Clerk of the County of Los Angeles, State of California and ex-Officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

[File endorsement omitted.]

[fol. 73] IN DISTRICT COURT OF JEFFERSON COUNTY

[Title omitted]

ORIGINAL ANSWER OF WM. SAENGER ET AL—Filed June 8, 1935

Comes defendants William Saenger, P. P. Butler, H. A. Perlstein, and W. H. Garretson, individually and as trustees for the Beaumont Export and Import Company, a dissolved corporation, and answering for themselves alone plaintiff's original petition filed herein May 27, 1935 and says:

(1) Plaintiff's suit herein should be abated and dismissed because there appears from said petition a misjoiner of parties defendant, and cause of action in that plaintiff's petition shows no joint liability of defendants

as individuals, and cause of action against the trustees of the dissolved corporation, if to charge its assets in their hands, is against them as trustees and not against the stockholders, and of this they pray judgment of the court.

(2) These defendants demur generally to plaintiff's said petition and say same shows no cause of action against them and of this they pray judgment of the court.

(3) They specially except to said petition because the same shows that the judgment herein mentioned and upon which the said cause of action is founded, is not final but interlu-tory, and not one upon which suit can be maintained.

(4) They further specially except to said petition because the same shows that the corporation defendant in said judgment herein set out had no legal existence at the time of rendition of said judgment and no legal judgment could have been rendered against it.

(5) They further specially except to said petition because the judgment therein set out is a personal judgment against a non resident of the state, over whose person the [fol. 74] court had and could acquire no jurisdiction.

(6) They further specially except to said petition because no liability on the part of these defendants either as trustees or as individuals for any debts of the corporation is shown.

(7) They further specially except to said petition and to that portion thereof wherein it is alleged that the judgment therein set out is a final judgment, because same is a conclusion of law and the terms of said judgment are not shown, and it cannot be determined whether the same be a final judgment or not.

(8) They further specially except to said petition because said petition shows upon its face that the judgment therein sued on is dormant and does not furnish the basis for a suit thereon except to revive the same, and of all these said special exceptions these defendants pray judgment of the court.

(9) It required to further answer herein, these defendants deny all and singular the allegations in said petition contained, and demand strict proof of same, and of this they put themselves upon the country.

(10) Specially answering herein these defendants say that if any judgment was ever rendered as set out in plaintiff's petition, the court rendering the same was without jurisdiction and right to render such judgment, because the same was rendered upon a cross action filed in a pending suit, and which said pending suit had been, and was at the time of the filing of such cross action, stayed and abated, pending and until the termination of a suit between the same parties in regard to the same subject matter pending in the Republic of Mexico, and over which the court in which said suit was pending, had jurisdiction of the subject matter and the parties.

(11) Further specially answering herein these defendants say that long prior to the filing of the action in the court of California, set out in plaintiff's petition by the [fol. 75] Beaumont Export & Import Company, against the defendant therein Rodolfo Montes, and in which the cross action shown in said petition is alleged to have been filed; the subject matter of said suit and of said cross action being personal property, was sold by Beaumont Export & Import Company, which was a corporation existing under the laws of Texas, a citizen of Texas and not a citizen of the Republic of Mexico, and doing business at Beaumont, in Jefferson County, Texas, and in the course of its business it had sold in regular course said property and other property personal in nature to said Rudolfo Montes, a citizen of said Republic of Mexico, and residing in said Republic, and which said property was shipped to and delivered to him in said Republic of Mexico, and upon due date for said merchandise, the said Montes had failed and refused to pay the agreed purchase price therefor and suit had been instituted by said Beaumont Export and Import Company against him in the courts of his domicile in the Republic of Mexico, wherein same was at all of the times herein mentioned pending and at issue in said courts of the Republic of Mexico, having jurisdiction of same until the same was finally terminated in said courts, as will be more fully hereinafter shown.

That pending said suit in the said Republic of Mexico, and after a trial thereof in an inferior but trial court of said Republic, the said defendant, Montes, removed himself and much of his belongings beyond said Republic and took up his residence in Los Angeles County, California,

where, after his said removal to said point, and while said cause was pending in the courts of Mexico as aforesaid, the said Beaumont Export & Import Company brought their action against him in Los Angeles County, California, upon the same and identical cause of action thereafter in said Los Angeles suit the said Montes obtained from said Los Angeles Court a stay of proceedings in said court, upon [fol. 76] the plea that the cause of action was legally pending and undetermined and further action thereon in the said Los Angeles County Court should be stayed and abated until final action had been had in the courts of said Republic of Mexico, and thereafter said cause of action and suit and all proceedings therein stood abated and stayed until the final determination of said controversy should be reached in the courts of said Republic of Mexico.

That thereafter said Beaumont Export & Import Company duly dissolved as a corporation and these defendants, as its directors at the time of its dissolution, took over, under the laws of its domicile, its corporate properties for the purpose of winding up its affairs, in conformity of the laws of the State of Texas, under which said corporation had its legal existence. That thereafter said cause of action pending in the Republic of Mexico passed legally through the courts of said Republic and final judgment was entered in the same in said courts in favor of said Beaumont Export & Import Company, which fully and finally settled all of the controversies between said company and said defendant, Montes and became and was a full final and complete settlement thereof, and a complete bar to any further action on the same or any portion of the same, and in which said judgment said corporation plaintiff had judgment for the amount of its debt with legal interest thereon and costs, and thereafter through due and legal process through the courts of said country, the Beaumont Export & Import Company collected its said judgment.

At some time, not known to these defendants and without any notice to them of any character, and as said cause in the said courts of said California had been stayed, and while said cause of action was being prosecuted and defended in the courts of Mexico, as hereinbefore shown, some character of cross action asking for affirmative relief was filed against said corporation, and without notice to said [fol. 77] corporation or to these defendants, and without knowledge on their part there was obtained through some

means not known to them, a judgment which has never been seen by these defendants and they do not know the nature and terms thereof, except as set out in plaintiff's petition herein.

These defendants show that under the facts hereinbefore recited, said pretended judgment set out in plaintiff's petition is wholly void and no cause of action exists against them by reason thereof, and all of this they put themselves on the country.

Geo. E. Holland, Attorneys for said Defendants.

[File endorsement omitted.]

[fol. 78] In District Court of Jefferson County

[Title omitted]

Original Answer of John F. Pipkin et al.—Filed June 8, 1935

Came defendants, John F. Pipkin, Morris M. Mothner, Mrs. Jenet Smith, Wm. Wahrmund, Mrs. B. R. Norvell, A. M. Kaufman, John Dollinger, Mrs. Lucy Sanders, Ray Hoopes, H. A. Sanders, and answering plaintiffs petition filed herein, in which they are named as parties defendant, they hereby adopt, for all purposes, and make as their own the answer to plaintiff's petition, of their co-defendants, Wm. Saenger et al., this day filed in this cause and pray as therein and in all things.

Geo. E. Holland, Attorney for the Defendants.

[File endorsement omitted.]

[fol. 79] In District Court of Jefferson County

[Title omitted]

Original Answer of Defendant C. A. Lord—Filed June 5, 1935

Comes now C. A. Lord, one of the defendants in the above entitled and numbered cause, and answers herein as follows:

1

This defendant excepts to the plaintiff's petition and says that on the face of the same it shows a misjoinder of

parties and a misjoinder of causes of action, and that no matters or facts are alleged that would entitle the plaintiff to join this defendant with the other defendants or any of them, and that no matters or facts are alleged that would show any common liability on the part of the defendants named in this suit or as between this defendant and the other defendants or any of them; on the contrary, all of the facts affirmatively show that there is not and cannot be any common liability that would permit this defendant to be joined with the other defendants or any of them. And of this special exception this defendant prays judgment of the court, and prays that said suit be dismissed or that in any event he be dismissed from the case as one of the defendants herein.

2

This defendant denies each and every, all and singular, the allegations in plaintiff's petition contained, demands strict proof thereof, and of this he puts himself upon the country.

C. A. Lord, Attorney for Himself.

[File endorsement omitted.]

[fol. 80] In District Court of Jefferson County

[Title omitted]

Plaintiff's Reply to Demurrers and Answers of William Saenger, P. P. Butler, S. A. Perlstein and W. H. Garretson Individually and as Trustees of Beaumont Export & Import Company—Filed November 1, 1935

Now comes Estaban Adams, plaintiff in the above entitled and numbered cause, and replying to the demurrers and answers filed herein by William Saenger, P. P. Butler, H. A. Perlstein and W. H. Garretson, individually and as trustees of the Beaumont Export & Import Company, constituting a part of the defendants herein, respectfully alleges and shows unto the court:

1. That the allegations of said defendants, as set forth in paragraph 10 of their said pleading, to the effect that another suit was pending in the City of Mexico in the

Republic of Mexico when the judgment upon the cross-action was obtained, as set forth in plaintiff's original petition, and that the said suit, in which the judgment herein sued on was obtained, was stayed and abated by reason of the pendency of such suit in Mexico, are wholly immaterial and irrelevant and constitute no defense to the cause of action now sued on in this court; and, therefore, plaintiff moves the court to strike the said pleading and all the allegations as shown in said paragraph 10; and of this he prays judgment of the court.

2. Plaintiff further shows unto the court that the allegations in paragraph or section 11 of said defendants' pleadings, and especially the first three paragraphs thereof and down to the paragraph thereof commencing "At sometime not known to these defendants and without any notice to them of any character," etc., all directly relate to the alleged merits of the original suit on the cross-action and constitute an attempt to set forth a defense to said cross-action on the merits, and, therefore, are all immaterial and [fol. 81] irrelevant and can constitute no defense to the cause of action now sued on before this court, because the merits of the original cross-action or suit or cause of action upon which the judgment was obtained in the California court are not and cannot be involved in this cause of action now before the court, which is brought upon the new cause of action created by the said judgment obtained in California and payable to the plaintiff and his predecessors in title; and, therefore, plaintiff prays and moves the court to strike every and all of said allegations from the record.

Howth, Adams & Hart, by M. G. Adams, Attorneys for Plaintiff.

[File endorsement omitted.]

[fols. 82-83] In District Court of Jefferson County

[Title omitted]

Order Sustaining General Demurrer and Dismissing Cause

On this the third day of December, A. D. 1935, this cause being regularly called for trial, came the parties plaintiff

and defendants by their respective attorneys of record and announced ready for trial upon the demurrer and exceptions of the defendant to plaintiff's first amended original petition and thereupon the court heard the general demurrer of the defendants to plaintiff's said petition with the argument of counsel thereon and being fully advised in the premises is of the opinion that defendants said general demurrer should be in all things sustained.

It is therefore ordered, adjudged and decreed by the court that defendants general demurrer to plaintiff's first amended original petition be and the same is hereby in all things sustained, and the plaintiffs in open court declining to amend their said petition further it is the order of the Court that plaintiffs said suit herein be and the same is hereby finally dismissed and that the defendants have and recover of plaintiffs all costs in this cause incurred and expended for which let execution issue.

To which judgment of the court plaintiffs in open court except and give notice of appeal to the court of Civil Appeals of the Ninth Supreme Judicial District of Texas at Beaumont, Texas.

R. L. Murray, Judge Presiding.

O. K. as to form. M. G. Adams, Atty. for Plfs.

[fols. 84-87] Bond on Appeal for $300.00, approved and filed December 9, 1935, omitted in printing.

[fols. 88-105] [File endorsement omitted.]

[fols. 106-113] In Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont

No. 2988

Estaban Adam, Appellant,

vs.

William Saenger et al., Appellees

Appealed from the District Court of Jefferson County Texas

Brief for Appellant—Filed May 6, 1936

[fol. 114] Assignments of Error

First Assignment of Error

The trial court erred in sustaining the general demurrer and dismissing plaintiff's cause of action, for that, in so doing it failed and refused to give "full faith and credit" to the final, valid and subsisting judgment duly entered of record by a superior court of California having general jurisdiction, after due service of notice and citation, in accordance with the applicable laws of the State of California; and thereby the trial court failed to fulfill and to comply with its duty as expressly prescribed by Article 4, Section 1 of the Constitution of the United States, which said constitutional provision is of the tenor following:

"Full Faith and Credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the effect thereof."

Second Assignment of Error

The court erred in sustaining the general demurrer and in dismissing plaintiff's cause of action, because the express allegations of the petition show that the Beaumont Export & Import Company, a Texas corporation, filed its suit for alleged debt against Rodolfo Montes, a resident citizen of Los Angeles County, California, in a superior

court of the State of California having general jurisdiction, and thereby voluntarily submitted itself to the jurisdiction [fol. 115] of that court, and to the procedural laws of the State of California; that thereafter, in due course, and by permission and under express orders of that court, the said Rodolfo Montes filed his cross action against the said Beaumont Export & Import Company and duly obtained the service and gave the notice required by the laws of California applicable to such cross actions; and that after due service and notice, the said Beaumont Export & Import Company having wholly made default, whereupon final judgment was duly rendered by said court in favor of said Montes and against the said cross defendant, Beaumont Export & Import Company.

Third Assignment of Error

The court erred in sustaining the general demurrer and in dismissing plaintiff's cause of action, for that, the express allegations of plaintiff's first amended original petition show that under the laws and the controlling decisions of courts of last resort of the State of California, a judgment rendered on such cross action is a final judgment, without regard to what action is taken on the main or plaintiff's cause of action, or whether or not any final disposition of it is ever made, and that such cross action is regarded and construed, under the California laws, as a cause of action wholly separate and distinct from the main action.

[fol. 116] Fourth Assignment of Error

The court erred in sustaining the general demurrer and in dismissing plaintiff's cause of action, because the allegations of plaintiff's first amended original petition expressly show that on September 15, 1930, the Beaumont Export & Import Company was voluntarily dissolved by the action of its stockholders in accordance with the laws of the State of Texas; that such dissolution was had sometime after the said corporation had filed its said suit in the California court against Montes and while said suit was still pending; that no notice of such dissolution was ever brought to the attention of the California court or to Montes or to his attorneys; that on November 7, 1932, Montes filed his said cross action, upon which due service was had on November 12, 1932, in accordance with the California laws; that

the said Beaumont Export & Import Company failed to answer to said cross action and that thereupon, on April 15, 1933, its attorney of record was given due notice of the motion to enter default judgment and that said motion was continued from time to time at the request of the attorney of record for the Beaumont Export & Import Company, but that notwithstanding, the said cross defendant continued in default, failing to answer or to make any defense to the cross action, whereupon the motion of Montes to enter default judgment was granted on May 7, 1933, and the said judgment thereafter, upon further notice to the said attorney of record for the Beaumont Export & Import Company, was duly entered of record, after fair and [fol. 117] full notice and opportunity was given and granted the said cross defendant to appear and make its defense, and that, therefore, the said California judgment is justly entitled to be given full faith and credit in, and by the courts of, the State of Texas.

Fifth Assignment of Error

The court erred in sustaining the general demurrer and in dismissing plaintiff's cause of action, because the express allegations of plaintiff's pleading show that after default judgment on the said cross action had been duly entered, as heretofore shown, the statutory trustees of the Beaumont Export & Import Company in actual charge, control and management of the assets of said dissolved corporation, retained Richard F. Bailey as their attorney, he being the same attorney that appeared of record and previously represented the Beaumont Export & Import Company in the said California litigation, and the said statutory trustees and the said attorney thereupon made their appearance in the said California court, but made such appearance and acted through the Beaumont Export & Import Company and filed their motion to set aside the said default judgment, and thereupon expressly put in issue and litigated before that court all of the facts relating to whether or not the Beaumont Export & Import Company had been duly served and given proper notice, as required by the laws of California as a condition precedent to the entry of the said default judgment against it in said cross [fol. 118] action, and the said California court, after hearing the evidence on said issue and the argument, duly

overruled their said motion to set aside the default judgment, and the said court, by necessary implication, thus found all of said fact issues against the movants. Wherefore, all of the fact issues of whether or not the Beaumont Export & Import Company was properly served and notified, as required by the laws of California, having been determined by the California court against the said corporation, and the said statutory trustees, as well as those that were stockholders at the time of its dissolution are res judicata among all the parties to the litigation and the Beaumont Export & Import Company and its statutory trustees at the time of its dissolution and its stockholders are thereby estopped to assert any lack or want of such proper service and notice.

Sixth Assignment of Error

The court erred in sustaining the general demurrer and in dismissing plaintiff's cause of action, for that, the express allegations of plaintiff's petition show that the Beaumont Export & Import Company filed its suit in the said California court and voluntarily submitted itself to its jurisdiction, and that while the said suit was pending its stockholders voluntarily dissolved it under the laws of Texas on the 15th day of September, 1930; that under the [fol. 119] laws of the State of Texas the said Beaumont Export & Import Company could sue and be sued for a period of three years from the date of its dissolution and that said Texas laws were applicable to the suit then pending in California; and that, consequently, when the judgment by default on the cross action was entered, to-wit, on the 31st day of May, 1933, the said Beaumont Export & Import Company, notwithstanding its dissolution, could still sue and be sued in California under and by virtue of the said statutory provisions of Texas; that when the statutory trustees, acting in the name of Beaumont Export & Import Company, filed their motion in said cause through their attorney, to-wit, on the 17th day of November, 1933, to set aside the said default judgment, the Beaumont Export & Import Company was defunct and without power to sue or be sued, but that notwithstanding, the statutory trustees filed their said motion and prosecuted the hearing thereon in the name of said corporation and knowingly or fraudulently or negligently failed to disclose to the court

or to Montes or to his attorneys that the said Beaumont Export & Import Company had been legally dissolved and that it was then without power or authority to sue or be sued under the laws of Texas, and, consequently, under the laws of California. Wherefore, the statutory trustees of the Beaumont Export & Import Company were the real parties at interest in filing the said motion to set aside the default judgment and in litigating the facts in support of said motion and in thus putting in issue their supporting evidence tending to show lack of service or notice on the Beaumont Export & Import Company upon which the [fol. 120] said default judgment was obtained and in litigating all of the fact issues relating to such service and notice, and that thereby they are conclusively estopped to assert that they are not the real parties at interest in said litigation and further estopped to assert improper or inadequate or lack of service and notice upon the Beaumont Export & Import Company on the said cross action; and the judgment and order of the California court overruling the said motion, after hearing the evidence and trying out the fact issues, is res judicata as to all of the said issues between the parties to this suit.

Seventh Assignment of Error

The court erred in sustaining the general demurrer and in dismissing plaintiff's cause of action, for that, even if there had been any defects of service on the cross action or with respect to notices of the motion for a default judgment (which is not admitted but expressly denied) the fact that Richard F. Bailey, attorney of record originally for Beaumont Export & Import Company and after its dissolution for the statutory trustees and stockholders of said corporation, obtained, at his request, or agreed to, two continuances of the motion that the court enter the default judgment upon which this suit is based, constitute a waiver, as a matter of law, of any and all defects of service, or even of a total failure of service; the allegations of plaintiff's petition expressly showing that the said attorney had [fol. 121] requested and had obtained two continuances of the hearing of said motion.

Eighth Assignment of Error

The court erred in sustaining the general demurrer and in dismissing plaintiff's cause of action, because the allega-

tions of his petition expressly show that he was the legal and equitable owner and holder of the said valid and subsisting judgment and all rights thereunder and that the said judgment was not barred by limitation nor otherwise invalidated.

Ninth Assignment of Error

It appearing from the allegations of the petition that the California procedure with respect to giving notice to the adverse party and affording ample opportunity to be heard before entry of judgment was strictly followed with respect to said cross action and that the said California procedure actually afforded an opportunity to the defendants to be heard and to have their day in court and was not in any wise inconsistent with the general canon of jurisprudence requiring that a defendant be offered a hearing before his rights can be affected by judicial action and are in substantial harmony with the laws of Texas applicable to the same or like facts and subject matter, the judgment of the lower court was an unreasonable denial of the rights accorded plaintiff under Article 4, Section 1, of the Constitution of [fols. 122-251] the United States, and an arbitrary refusal to give full faith and credit to said "public acts, records and judicial proceedings" of the State of California; and the said judgment probably resulted from the identical local influences the said constitutional provision was designed to defeat.

Tenth Assignment of Error

The court erred in sustaining the general demurrer, for that, the pleadings show a final, valid, subsisting and unsatisfied judgment rendered by a California court of general jurisdiction and of record, having jurisdiction of the subject matter, and after obtaining jurisdiction of the Beaumont Export & Import Company and of the statutory trustees thereof, upon its dissolution, and after their voluntary submission to the jurisdiction of said court, and the said pleadings further expressly and definitely show all of the other elements of a cause of action upon said judgment; and the action of the trial court was an arbitrary denial of the "full faith and credit" clause of the Constitution of the United States.

[fol. 252] [File endorsement omitted]

IN COURT OF CIVIL APPEALS OF TEXAS

No. 2988

ESTABAN ADAM, Appellant,

vs.

WILLIAM SAENGER et al., Appellees

OPINION—Filed January 28, 1937

This is a suit by Estaban Adam against William Saenger, et al., as officers, directors and statutory trustees of the Beaumont Export & Import Company, a defunct Texas organization, to recover on a judgment obtained in one of the Superior Courts of the State of California, County of Los Angeles, by Rodolfo Montes, against the Beaumont Export & Import Company, a Texas corporation, on his cross-complaint, in the sum of $5,000.00 and costs of court; Adam being the owner of said judgment by purchase for a valuable consideration.

The facts leading up to said judgment in favor of Montes on his cross action against said Beaumont Export & Import Company are: on May 31, 1929, the Beaumont Export & Import Company, a Texas corporation, as plaintiff, filed suit against Rodolfo Montes, defendant, in the Superior Court of Los Angeles County, California, said suit being numbered 279850, for the sum of $6,043.37, same being the purchase price of certain fixtures, goods, wares and merchandise alleged to have been purchased by said Rodolfo Montes from said Beaumont Export & Import Company, and by it shipped and delivered to Montes at his place of business in the City of Mexico in Mexico. Said company filed an amended petition in said cause on July 18, 1929.

Montes, the defendant, filed his answer in said suit on August 22, 1929, and on October 19, 1929, filed an amended answer setting up a plea in abatement.

On September 15, 1930, the Beaumont Export & Import Company, by the voluntary action of its stockholders in accordance with the laws of Texas, dissolved said corpo- [fol. 253] ration and filed with the Secretary of State a certificate of such action, and he gave a certificate of its disso-

lution. Notice or information of its dissolution was not given to the California court where the suit was pending, nor was any action taken looking to the dismissal of said suit, or to in any manner dispose of same, but same was left pending on the docket.

Some two years later, on November 7, 1932, by permission of the court, Montes filed in said cause a cross-complaint against the Beaumont Export & Import Company to recover of it for the value of certain goods and chattels (enumerating them) alleged to have been unlawfully converted by cross defendant, of the alleged value of $5,000.00. Service on or notice to said Beaumont Export & Import Company of the filing of this cross action by Montes against it was by leaving a notice at the office of Richard F. Bailey in Los Angeles, California, he being a lawyer and a member of the law firm that represented said Beaumont Export & Import Company in filing its suit against Montes. This notice to Bailey of the filing of the cross action, was on November 11, 1932. Judgment by default in favor of Montes against the Beaumont Export & Import Company for $5,000.00 and costs of suit was rendered on May 24, 1933, and entered of record May 31, 1933. Notice of this judgment was given Bailey on September 6, 1933. On November 17, 1933, Bailey, purportedly acting for Beaumont Export & Import Company, filed motion to set aside the judgment against said company, contending that no notice of the filing of the cross action was ever, in any manner, given him, and at the same time he filed answer to the cross action. The motion to set aside the judgment upon hearing was overruled, and so the answer was not considered. No appeal or action of any kind was taken from these proceedings. Montes assigned the judgment to Consuelo H. DeMontes on June 6, 1933, and she assigned the judgment [fol. 254] to Estaban Adam, appellant, on September 20, 1933. On January 31, 1935, the suit by the Beaumont Export & Import Company against Rodolfo Montes, No. 279850, was dismissed for want of prosecution.

The instant suit was brought in the 60th District Court of Jefferson County, Texas, on May 27, 1935, against appellants to establish and recover on the above mentioned judgment. We shall not undertake to state the substance of appellant's petition, but will say that his asserted right was fully and admirably pleaded, and his prayer ample. The defendants, William Saenger, P. P. Butler, H. A. Perlstein,

and W. H. Garretson, answered individually and as trustees for the Beaumont Export & Import Company (the dissolved corporation, cross defendant in the California suit) by pleas in abatement, general demurrer, special exceptions, general denial, and several special matters of defense not believed necessary to state. The other defendants answered adopting the pleadings of William Saenger, et al., and by filing general demurrer and general denials. The general demurrers of all the defendants were sustained by the court, and plaintiff, appellant, refusing to amend, the suit was dismissed.

The judgment will have to be affirmed, because, in our opinion, the court rendering the judgment was without jurisdiction to render same for want of jurisdiction over the cross defendant in the suit, and the judgment was, therefore, void. We think so, because:

(a) The cross action sought a personal judgment against the cross defendant. The cross defendant was a non-resident, and in order for the court to have had jurisdiction over cross defendant personal service upon it must have been had. The cross action was not an ancillary proceeding, but an independent suit in which a final judgment could be rendered without awaiting a decision in the original suit. Farrar v. Steensburg, 173 Cal. 94, 159 Pac. 707. It is well settled in this State that a cross action occupies the atti- [fol. 255] tude of an independent suit and requires service of the cross action upon the cross defendant. Harris v. Schlinke, 95 Tex. 88. This being so, in the absence of a waiver of service, or an appearance by the cross defendant, personal service on the cross defendant must be had to confer jurisdiction upon the court to determine the matter and render judgment in the case. Appellant does not contend otherwise, but insists that it obtained such service under the California statutes regulating service on parties. He pleads the California statutes, as follows:

"Sec. 1015. Service Where Defendant Resides Out of State.

"When a plaintiff or a defendant, who has appeared, resides out of the State, and has no attorney in the action or proceeding, the service may be made on the clerk or on the justice where there is no clerk, for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the at-

torney instead of the party, *except service of subpoenas, or writs and other procress issued in the suit,* and of papers to bring him into contempt. If the sole attorney for a party is removed or suspended from practice, then the party has no attorney within the meaning of this section. If his sole attorney has no known office in this state, notices and papers may be served by leaving a copy thereof with the clerk of the court or with the justice where there is no clerk, unless such attorney shall have filed in the cause an address of a place at which notices and papers may be served on him, in which event they may be served at such place". (Italics ours.)

"Sec. 442. Cross-Complaint.

"Whenever the defendant seeks affirmative relief against any party, relating to or dependent upon the contract, transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. *The cross-complaint must be served upon the parties affected thereby,* and such parties may demur or answer thereto as to the original complaint. *If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action".* (Italics ours.)

It will be observed that "Section 1015", supra, plainly excepts from its provisions for service of notices and [fol. 256] papers on parties to a suit, "subpoenas, writs and other process issued in the suit". These—*"subpœnas, writs and other process"*—must be served on the respective parties to be affected by the process—there must be personal service of all such. That citations to bring parties into court to litigate their respective rights, are "writs" and "process" issued by the court will hardly be questioned. They are universally recognized as such by all jurisdictions. So, under this law, California requires personal service of such. There being no service of citation served upon Beaumont Export & Import Company to appear and answer appellant's cross action wherein it sought affirmative relief against said company in the form of a personal judgment

for debt, and said company not having appeared or answered before the rendition of the default judgment against it made the basis for recovery herein, the court was without jurisdiction to hear and determine the matter, and without jurisdiction to render the judgment, and so said judgment is without virtue and was void.

(b) Also, we think "Section 442", supra, relating to service in cross actions, relied upon by appellant fails to support his contention that "personal service" was had upon Beaumont Export & Import Company notifying it to answer his cross-complaint, and therefore the court had jurisdiction of the matter, and the default judgment was authorized and is enforceable. An inspection of said law discloses that it provides that "the cross-complaint must be served upon the parties affected", that "if any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action". What does the language "if any of the parties affected by the cross-complaint have not appeared in the action" mean? To what [fol. 257] action does it refer? We take it that it can have but one reference, and that is to the cross action—the action asserted by the defendant against the plaintiff in such suit. It would be rather unusual to contend that a plaintiff can become a cross-complainant against the defendant that he has sued directly. Cross suits are brought by defendants against the plaintiffs suing them, and because the plaintiff has appeared and submitted himself to the jurisdiction of the court for the purpose of his suit, it could not be reasonably contended that he has appeared in all kinds of other claims that may be asserted against him by cross actions therein. The statute certainly refers to and means the action asserted in the cross-complaint, and that if any party to be affected by the cross action does not appear voluntarily in such suit, then a summons must be issued and served upon him "in the same manner as upon the commencement of an original action." It is without dispute that no service was had personally on appellee, nor that it voluntarily appeared before the default judgment was rendered. The recitation of the judgment shows it was by default. The contention is whether the notice of the filing of the cross claim by appellant left at the office of Richard Bailey, a member of the law firm that represented the com-

pany in filing its suit against Montes some three years before, was valid service—personal service as required by both the laws set out supra. We think that both statutes, under the facts shown, required service of citation, or writ, be made upon the cross defendant personally, not substituted service as is shown. Appellant's petition on its face showing an invalid judgment sought to be made the basis for recovery, the court did not err in sustaining the general demurrers leveled at it, nor in dismissing the suit.

But, if we are in error in construing the California statutes above discussed, and it should be said that they do [fol. 258] authorize service upon non-residents in proceedings such as here by service on the lawyer or person representing the non-resident—that is by substituted service, then such statute is without force because as said in Black on Judgments, (2nd Ed.), Sec. 904, p. 1343, "No state can extend its jurisdiction over a person who is not a resident of such state and not within its limits at the time, and who does not appear or authorize an appearance, so as to render a judgment or decree which shall be binding upon him personally. For that purpose, constructive or substituted service is of no avail". The instant suit being one in personam and not in rem, and the judgment being one by default on substituted service on a non-resident defendant must be treated as a nullity in this state which is called upon to enforce it by action. Pennoyer v. Neff, 95 U. S. 725, 24 L. Ed. 565. In the cited case, it is said:

"But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose."

It is well settled that a judgment rendered in one state against a resident of another state, who was not served with process and did not appear in the action, either personally or by authorized attorney, is not valid or binding out of the state where rendered, although the attempt to acquire jurisdiction may have been in a mode recognized as sufficient and valid by the laws of the state where the judgment was rendered; and such absence of jurisdiction will defeat an action on such judgment for its enforcement in any other state. Black on Judgments (2nd Ed.), Vol.

2, Sec. 906, p. 1347 (and authorities cited). The principles of the law relating to the acquisition of jurisdiction by courts over non-resident defendants, apply equally to foreign corporations as to natural persons. A corporation is a resident of the state which creates it, and if sued in the courts of another state, jurisdiction over it can only be acquired in some mode equivalent of personal service of [fol. 259] process on an individual.

Appellant's petition showing on its face that the judgment declared upon was not a valid enforceable judgment in this State, the court did not err in sustaining the general demurrer urged against it and in dismissing the suit. The judgment of the trial court should be affirmed, and it is so ordered.

Affirmed.

W. B. O'Quinn, Associate Justice.

[Endorsed:] Filed Jan. 28, 1937. R. E. Cowan, Clerk District Court of Jefferson Co., Tex., by F. A. Baxter, Deputy.

[fol. 260] In Court of Civil Appeals of Texas

No. 2988

Estaban Adams

vs.

William Saenger et al.

From the District Court of Jefferson County

Opinion by Associate Justice O'Quinn

Judgment—January 28, 1937

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellant, Estaban Adams, and the sureties on his appeal bond, C. W. Howth, M. G. Adams and Lamar Hart, pay all costs in this behalf expended; and this decision be certified below for observance.

[fol. 261] [File endorsement omitted]

IN COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF TEXAS AT BEAUMONT

[Title omitted]

APPLICATION FOR REHEARING—Filed February 9, 1937

2/17/37—Overruled.

First. The court erred in overruling and in refusing to sustain appellant's First, Second and Fourth Assignments of Error and in overruling and refusing to sustain the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth propositions thereunder, and in holding that the service had on the cross action against Beaumont Export & Import Company and its statu- [fols. 262-264] tory trustees after its dissolution was not such personal service as the laws of California required, for that, the decisions by the California courts of last resort had construed the statutes of the state applicable to proper service, in the circumstances, and the service obtained was in compliance with such construction of the statutes by said courts of California, and their construction thereof was binding upon the courts of other states, and this Honorable Court erred in putting a different construction on said statutes, and in holding that the said service did not constitute personal service, for that the said cross-defendants had voluntarily entered and submitted themselves to the jurisdiction of the California court and were at all times present through their duly constituted attorney, R. F. Bailey; and in so holding, this court has failed and refused to give that "full faith and credit to the public acts, records and judicial proceedings" of the state of California required by Article 4, Section 1, of the Constitution of the United States, of the tenor following:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

[fols. 265-273] Second. The court erred in failing and refusing to pass upon, or in overruling by implication, appellant's Fifth, Sixth and Seventh Assignments of Error,

and the Fifteenth, Sixteenth, Seventeenth and Eighteenth propositions thereunder, wherein it was alleged that after the judgment on the cross action had been entered, the statutory trustees of the Beaumont Export & Import Company retained R. F. Bailey as their attorney and authorized him to enter their appearance in said cause pending in said superior court of California, for the purpose of setting aside the said judgment and for filing an answer to the cross action, and that the said trustees, through their said attorney, did duly make their appearance in said court, filed a motion to set aside said judgment, and thereupon joined issue as to all of the facts relating to whether or not the service obtained against them on the cross action was proper and sufficient under the laws of California, and therein litigated all of said fact issues, and the court having found against them on all of said fact issues, and having found that the service had was adequate and having entered judgment to that effect, all of said issues became res judicata and the said statutory trustees are thereby estopped to assert that the said service on them on the cross action was insufficient under the laws of California, and they thereby waived all defects or lack of service; and in so holding, this court has failed and refused to give and has wrongfully denied appellant, that "full faith and credit to the public acts, records and judicial proceedings" of the state of California required by Article 4, Section 1, of the Constitution of the United States, as aforesaid.

[fol. 274] Third. The court erred in determining this appeal exclusively on the issue as to whether or not proper service had been obtained in accordance with the law of California on the appellees in the cross action, and in absolutely ignoring or inadvertently failing duly to consider and determine the issue of res judicata of the jurisdictional facts and the legal effect thereof as an estoppel against appellees to assert lack or inadequacy of service upon them in the cross action, for that this issue is paramount to lack of service and is determinative of the appeal contrary to this Honorable Court's holding, and this is so even on the assumption that said service was wholly inadequate or constituted no service at all under the California law.

Fourth. The court erred to the grave prejudice of appellant in failing or refusing expressly to consider and determine the controlling federal question in this appeal,

to-wit, the waiver, res judicata and estoppel aforesaid on the part of appellees in voluntarily submitting themselves to the jurisdiction of the California court and therein litigating the facts relating to proper service and jurisdiction of that court, and a further refusal by this Honorable Court expressly to determine the said issue and federal [fol. 275] question will wrongfully jeopardize appellant's rights on further appeal and put the burden upon him to show affirmatively that the said issues and resulting federal question were properly raised in the trial court and timely presented in this court, although appellant expressly claimed his rights under the "full faith and credit clause" of the federal constitution in his pleading in the trial court and in his written brief and in oral argument in this court.

[fols. 276-277] Sixth. The express allegations of appellant's petition show as a fact that the laws and decisions of California on the said issues of res judicata, estoppel and waiver are the same as those of Texas; and that by the law of Texas on the said subject matters, the appellees would, under the facts and circumstances explicitly alleged, waive all defects or failure of service and be conclusively estopped by the principle of res judicata to assert or rely on said lack or inadquacy of service.

[fol. 278] In Court of Civil Appeals for the Ninth Supreme District of Texas, at Beaumont

[Title omitted]

Amendment to Original Application for Rehearing—Filed February 9, 1937

Fifth

The court erred in overruling and refusing to sustain appellant's First, Second and Fourth Assignments of Error, and in overruling and refusing to sustain the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Propositions thereunder, and in holding that the service had on the cross-action against Beaumont Export & Import Company and its statutory trustees after its dissolution was not such personal service as the law of California requires, for that, appellant's

petition alleged and set out the California statutes and decisions covering said subject matted and the decisions [fols. 279-283] by the California courts of last resort construing said statutes as holding that the service obtained in the instant case was in compliance with the said California laws and decisions, and all of said allegations were statements of facts which must be taken by this Honorable Court as true as against the sustaining of the general demurrer by the trial court; and, therefore, the issue as to the truth or falsity of said allegation is a question not involved in this appeal and could not possibly be determined by this court one way or the other until the court has before it the evidence in support of or against the said allegations of fact.

[fols. 284-285] In Court of Civil Appeals of Texas

Jefferson

No. 5053-2988

Estaban Adams

vs.

William Saenger et al.

Order Overruling Application for Rehearing—February 17, 1937

Appellant's motion for rehearing is overruled.

[fols. 286-302] In Supreme Court of Texas

Estaban Adam, Plaintiff in Error,

vs.

William Saenger et al., Defendants in Error

Application for Writ of Error—Filed March 17, 1937

To the Supreme Court of Texas:

[fols. 303-347] First Assignment of Error

The Court of Civil Appeals erred in overruling, by implication, and in refusing to sustain plaintiff in error's

Fifth Assignment of Error and his Fifteenth supporting proposition, wherein the following contention was raised and presented, to-wit: The petition alleged that after the judgment on the cross action had been entered, the statutory trustees and successors of the Beaumont Export & Import Company retained Richard F. Bailey as their attorney and authorized him to enter their appearance in said cause pending in said Superior Court of California, for the purpose of setting aside the said judgment and for filing an answer to the cross action, and that the said trustees, through their said duly authorized attorney, did make their general appearance in said court, filed motion to set aside said judgment and thereupon joined issue as to all the facts relating to whether or not the service obtained against the Beaumont Export & Import Company on the cross action was proper and sufficient under the laws of California, and therein litigated all of said fact issues, relating to jurisdiction, and the court having found against them on all of said fact issues, and having found that the said service was adequate, and having entered judgment to that effect, all of said issues because res judicata and said statutory trustees are thereby estopped to assert the said service was insufficient under the laws of California and they thereby waived all defects or lack of service; and in so holding the Court of Civil Appeals has failed and refused to give and has wrongfully denied plaintiff in error that "full faith and credit to the public acts, records and judicial proceedings" of the State of California required by Article 4, section 1, of the Constitution of the United States of the tenor following:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

(Based on second ground of motion for rehearing.)

[fols. 348-358] Second Assignment of Error

The Court of Civil Appeals erred in impliedly overruling plaintiff in error's Fifth Assignment of Error and his Sixteenth supporting proposition, for that, it was alleged in the petition that after the judgment was entered on the cross action the defendants in error, through their duly authorized attorney, Richard F. Bailey, filed a motion to set aside the said judgment on the ground that the said

judgment had been entered through "the mistake, inadvertence, surprise or excusable neglect of plaintiff's and cross-defendant's counsel" (this being the only ground alleged in the motion), and at about the same time duly filed an answer to the cross action on its merits and denying the allegations thereof, and in the verification of said answer stated under oath that he was duly authorized as attorney of record to file the said answer.

(Based on second ground of motion for rehearing.)

[fols. 359-361] Third Assignment of Error

The Court of Civil Appeals erred in arbitrarily refusing to consider and expressly to adjudicate the issue, duly presented to that court on appeal, that controls the final disposition of the whole case, to-wit, that of res judicata, estoppel and waiver aforesaid against the appellees in voluntarily submitting themselves to the jurisdiction of the California Court and therein litigating the fact issues relating to proper service and jurisdiction of that court, as shown under First Assignment of Error and the propositions thereunder.

(Based on fourth ground of motion for rehearing.)

[fols. 362-372] Fourth Assignment of Error

The Court of Civil Appeals erred in overruling and in refusing to sustain plaintiff in error's First, Second and Fourth Assignments of Error and in overruling and refusing to sustain the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Propositions thereunder, all of which said assignments and propositions raised and presented the single contention that the service obtained in California as a basis for the judgment was proper and sufficient, and, therefore, the lower court erred in holding that the service had on the cross action against the Beaumont Export & Import Company and its statutory trustees after its dissolution was not such personal service as the laws of California required, for that, the decisions by the California courts of last resort had construed the statutes of the state applicable to proper service, in the circumstances, and the service obtained was in compliance with such construction of the statutes by said courts in California, and their construction thereof was

binding upon the courts of other states, and the lower court erred in putting a different construction on said statutes and in holding that said service did not constitute personal service, for that, the Beaumont Export & Import Company before dissolution, and its statutory trustees and successors after dissolution, had voluntarily entered and submitted themselves to the jurisdiction of the California Court and were at all times present through their duly authorized attorney, Richard F. Bailey; and in so holding the lower courts have failed and refused to give that "full faith and credit" to the public acts, records and judicial proceedings of the State of California required by Article 4, section 1, of the Constitution of the United States, as aforesaid.

(Based on first ground of motion for rehearing.)

[fol. 373] Fifth Assignment of Error

On every and all of the grounds set forth in the foregoing assignments of error, one to four inclusive, and all proposition thereunder, both the Court of Civil Appeals and the trial court erred in failing and refusing to give full faith and credit as required by Article 4, section 1, of the Constitution of the United States, to the final judgment rendered by the Superior Court of California, the same being a court of general jurisdiction, as alleged and as shown by the record.

[fol. 374] Filed Mar. 13, 1937. W. G. Woodard, Clerk, Ninth Supreme Judicial District, Beaumont, Texas.

Forwarded to Supreme Court of Texas, on March 16, 1937.

[fol. 375] Clerk's Office, Supreme Court of Texas

Endorsement on Application for writ of Error:

Application No. 22622. In the Supreme Court of Texas. Estaban Adam, Plaintiff in Error vs. William Saenger et al., Defendants in Error. Application for writ of error. Original for Supreme Court. Filed March 13, 1937. W. G. Woodard, Clerk, Ninth Supreme Judicial District, Beaumont, Texas. Filed in Supreme Court March 17, 1937. S. A. Philquist, Clerk, By Carl B. Lyda, Deputy. Dismissed W. O. J.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 376] IN SUPREME COURT OF TEXAS

App. No. 22622

ESTABAN ADAM

vs.

WILLIAM SAENGER et al.

From Jefferson County 9th District

ORDER DISMISSING APPLICATION FOR WRIT OF ERROR—March 31, 1937

This day came on to be heard the application of Plaintiff in Error for a writ of error to the Court of Civil Appeals for the Ninth District, and the same having been duly considered, it is ordered that the application be dismissed for want of jurisdiction; that applicant, Estaban Adam and sureties, C. W. Howth, M. G. Adams and Lamar Hart, pay all costs incurred herein.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 377] IN SUPREME COURT OF TEXAS

[Title omitted]

MOTION FOR REHEARING ON APPLICATION FOR WRIT OF ERROR—Filed April 14, 1937

To the Supreme Court of Texas:

[fols. 378-382] First Assigned Error

This Honorable Court erred in dismissing said application for want of jurisdiction, because the real issue therein presented to this court was whether or not plaintiff in error's first amended original petition stated a cause of action as against the general demurrer sustained by the trial court, and which said action was affirmed by the Court of Civil Appeals.

[fol. 383] Second Assigned Error

The Supreme Court in dismissing the application for the writ for alleged want of jurisdiction, and both of the lower courts, as to all of the errors as shown and set forth in the application to this court for writ of error to the Court

of Civil Appeals, have erroneously failed and refused [fol. 384] to give the said California judgment that full faith and credit required by Article 1, Section 4, of the Constitution of the United States of the tenor following:

"Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

[fol. 385] [File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

[fols. 386-388] IN SUPREME COURT OF TEXAS

Motion No. 12913

ESTABAN ADAM

vs.

WILLIAM SAENGER et al.

From Jefferson County, 9th District

ORDER OVERRULING MOTION FOR REHEARING—April 28, 1937

The motion for rehearing herein by the plaintiff in error, having been heretofore presented to the Court, and after due consideration of same, it is ordered that the said motion be and it is hereby overruled.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 389] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 390] SUPREME COURT OF THE UNITED STATES

STIPULATION DESIGNATING PARTS OF RECORD TO BE PRINTED

To Mr. Charles Elmore Cropley, Clerk of the Supreme Court of the United States:

It is hereby stipulated and agreed by and between counsel of record for all parties in the above entitled and numbered cause that only the following parts of the record as filed in this case need be printed by the clerk, or under his super-

vision, for the purposes both of the Petition for Writ of Certiorari to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont, and for the hearing of said cause in the Supreme Court if the writ is granted, to-wit:

Title of Paper	Record Page
1. Caption	
2. The following contents of what is designated in the said Court of Civil Appeals as the "Transcript" to-wit:	
[fol. 391] References are to pages of instruments named.	
(a) Plaintiff's first amended original petition	12–72
(b) Original answer of William Saenger, et al.	73–77
(c) Original answer of John F. Pipkin, et al.	78
(d) Original answer of defendant, C. A. Lord	79
(e) Plaintiff's reply to demurrers and answers of William Saenger, et al.	80–81
(f) Order sustaining general demurrer and dismissing cause, date thereof and endorsements	82–83
(g) Appeal bond (only that part usually printed by the Clerk of the Supreme Court of the United States), approval by the clerk of the district court and endorsements	84–85
2. The opinion by the Court of Civil Appeals, date of the filing and endorsements	1–8
3. Endorsements on Application for rehearing filed by appellant, showing date upon which it was filed, endorsements, etc. but application not to be printed except as hereinafter stated	1
4. Endorsements on Amendment to the original application for rehearing and date of filing endorsements, etc. but amendment not to be printed except as hereinafter stated	1
5. Order and judgment of the Court of Civil Appeals overruling the application for rehearing, showing date upon which it was overruled, endorsements, etc.	7

Title of Paper	Record Page
6. The date upon which appellant filed with the clerk of the Court of Civil Appeals his application to the Supreme Court of Texas for writ of error, showing also the date upon which it was transmitted, in due course, to the Clerk of the Supreme Court	89–90
7: The dates of the filing of the application to the Supreme Court of Texas for writ of error:	
(a) Date of filing with Clerk of the Court of Civil Appeals	89
(b) Date of filing with Clerk of the Supreme Court	90
[fol. 392]	
8. Order and judgment of the Supreme Court of Texas dismissing the application for writ of error for want of jurisdiction, the date thereof, endorsements, etc.	91
9. Date of filing with the clerk of the Supreme Court of Texas the motion for rehearing on the application for writ of error and endorsements thereon	9
10. Order and judgment of the Supreme Court overruling the motion for rehearing, together with the date of filing and all endorsements thereon	10
11. Appellant's assignments of error, consisting of First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Assignments of Error, as contained in appellant's brief filed in said Court of Civil Appeals, and shown on pages 9 to 17, inclusive, thereof (that is, only verbatim copies of the assignments themselves shall be printed and no other parts of the brief)	9–17
12. Only the grounds or reasons themselves in Ct. Civ. App. urged by appellant for rehearing, as shown in his "Application for Rehearing" shall be printed (that is, no other parts of the application for rehearing shall be printed); the said grounds to be printed verbatim being as follows:	
(a) First	1
(b) Second	5
(c) Third	14

Title of Paper	Record Page
(d) Fourth	14
(e) Sixth	16
(f) Fifth, as shown in the amendment to the original application for rehearing	1

13. With respect to the contents of the application to the Supreme Court of Texas for writ of error, only verbatim copies of the assignments shall be printed (but the propositions, statements, authorities, arguments, etc., under each assignment shall not be printed); the assignments to be printed are as follows:

[fol. 393]

(a) First Assignment of Error	18
(b) Second Assignment of Error	63
(c) Third Assignment of Error	74
(d) Fourth Assignment of Error	77
(e) Fifth Assignment of Error	88

14. With respect to the contents of the motion for rehearing on application to the Supreme Court of Texas for writ of error only verbatim copies of the assignments shall be printed (but the propositions, statements, authorities, arguments, etc., under each assignment shall not be printed); the assignments to be printed are as follows:

(a) First Assigned Error	2
(b) Second Assigned Error	7

15. Certificate by Clerk of the Court of Civil Appeals of Texas

16. Stipulation designating parts of the record to be printed

Dated at Beaumont, Texas, this 8th day of May, 1937.

Howth, Adams & Hart, by M. G. Adams, Attorneys for Estaban Adams, Petitioner. Geo. E. Holland, Attorney for William Saenger, et al., Respondents.

[fol. 394] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the Court of Civil Appeals of the State of Texas, 9th Supreme Judicial District is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

(2416)

Office - Supreme Court, U. S.
FILED
JUL 6 1937
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

SUPREME COURT OF THE UNITED STATES

No. 197

OCTOBER TERM, 1937.

ESTABAN ADAM, PETITIONER,

VS.

WILLIAM SAENGER, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS AT BEAUMONT.

Howth, Adams & Hart,
Attorneys for Petitioner.

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5. Point One. 30

"If party to a suit makes general appearance as a defendant, and especially if he puts in is-

sue and litigates the jurisdictional facts as to whether or not proper service has been had upon him, the judgment of the court thereon is res judicata and operates as an estoppel."

6. Point Two. 43

"It is a constitutional right of a litigant to have the courts adjudicate an issue when judicial action thereon is properly invoked."

7. Point Three. 44

"In Texas the statutes and laws of other states must be plead and proved, otherwise they will be presumed to be the same as the statutes and laws of Texas; and where the statutes and laws of another state are plead a general demurrer admits such laws and their interpretation by the courts to be as plead."

8. Point Four. 46

"In filing its suit against Montes in the Superior Court of California and in authorizing Bailey to represent it, the Beaumont Export & Import Company was at all times personally within the jurisdiction of that court, until it became completely defunct and incapable of any legal action on September 15, 1933, and thereafter its statutory trustees, in employing and authorizing Bailey to file suit in the name of the Beaumont Export & Import Company to set aside the default judgment, were personally and voluntarily within the jurisdiction of said court through their attorney, Bailey."

9. Point Five. 50

"In refusing to adjudicate the paramount and controlling issue of res judicata and estoppel and in volunteering a construction of the Cali-

fornia statutes prescribing service different from the construction of said statutes by the California courts, the Texas courts refused to give the California judgment that full faith and credit required by Article IV, Section 1, of the Constitution of the United States."

10. Point Six. 53
"Substantive rights and liabilities of a dissolved corporation are determined by the state of its creation; but the method or manner of obtaining service upon a dissolved corporation, as well as making service on all other defendants, is determined by the law of the forum."

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SUPREME COURT OF THE UNITED STATES

No. .....

OCTOBER TERM, 1937.

ESTABAN ADAM, PETITIONER,

VS.

WILLIAM SAENGER, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE NINTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS AT BEAUMONT.

To the Honorable the Supreme Court of the United States:

The petition of Estaban Adam, petitioning from a final judgment of the Court of Civil Appeals for the Ninth Supreme Judicial District of the State of Texas (at Beaumont), affirming the judgment of a district court of Jefferson County, Texas, sustaining a general demurrer to petitioner's first amended original petition and dismissing his cause of action against the statutory trustees and stockholders of Beaumont Export & Import Company, respectfully shows to this Honorable Court:

I.

SUMMARY OF MATTER INVOLVED.

1. The petitioner brought this suit against the respondents in the District Court of Jefferson County, Texas, to establish and recover on a final, valid and unsatisfied judgment rendered by a Superior Court of Los Angeles County, California.

He claimed in his pleading in the trial court, and asserted at every step in exhausting his remedies provided by the law of Texas in his appeals to all of her courts having jurisdiction of the cause of action, his constitutional right to require the Texas courts to give said California judgment that "full faith and credit" required by Article IV, Section 1, of the Constitution of the United States.

The manner in which this claim of right—this federal question—was expressly raised and presented throughout the whole cause is shown in detail under the heading of Jurisdiction, paragraph 3 of the supporting brief (page 25).

2. The California judgment arose out of the following facts:

On May 31, 1929, the Beaumont Export & Import Company, a corporation created under the laws of Texas, voluntarily entered and submitted itself to the jurisdiction of a Superior Court of Los Angeles County, California, a court having general jurisdiction under the laws of said state (paragraph 2 of the petition, R. 2 and 3).

and filed therein its suit against Rodolfo Montes for the sum of six thousand forty-three and 37/100 dollars ($6,043.37), the alleged purchase price of certain goods and merchandise.

Montes answered thereto and later, with the express permission of the court, filed his cross-action against the said plaintiff corporation for alleged unlawful conversion of the said goods and merchandise of the alleged value of five thousand dollars ($5,000.00), for which said amount the judgment by default herein sued upon was rendered in his favor against Beaumont Export & Import Company (paragraphs 1 and 2, R. 1 and 2; Exhibit A to petition, R. 21 to 24; Exhibit D to petition, R. 26 and 27).

Sometime after the filing of the said suit in the California court and while it was still pending, the Beaumont Export & Import Company was legally dissolved by the voluntary action of its officers, directors and stockholders, and a certificate of such dissolution was issued by the Secretary of State of Texas; and thereupon the then president and directors of said corporation became *ipso facto,* under the Texas laws, the statutory trustees to take charge of and administer the corporate assets as a trust fund for the creditors and stockholders of said company. (Article 1388 of the Revised Civil Statutes of Texas for 1925, copied in appendix.)

The said statutory trustees accepted the trust by taking charge of said corporate assets and have ever since been in possession thereof (paragraph 17 of petition, R. 14 and 15).

Wherefore, the said statutory trustees and stockholders were made defendants (respondents here), in this suit.

Estaban Adam, the plaintiff in the trial court and the petitioner here, by purchase for valuable consideration, became the legal and equitable owner of said California judgment (paragraph 15 of petition, R. 13).

3. The following is a condensed statement of the allegations of petitioner's first amended original petition, to which the District Court of Texas sustained a general demurrer and dismissed the cause of action:

(a) That the judgment entered by the Superior Court of California in favor of Montes on his cross-action against the Beaumont Export & Import Company was a final and not an interlocutory judgment, under the laws of California (paragraph 4 of petition, R. 4);

(b) That proper, legal and personal service, as required by the laws of California, was obtained on the Beaumont Export & Import Company by serving a true copy of the cross-complaint and order of the court permitting the filing thereof upon the company's then attorney of record, Richard F. Bailey (paragraph 5 of the petition, R. 4, 5 and 6);

(c) The statutes of California and the construction thereof by the decisions of the California courts of last resort (citing the decisions), relating to and providing the manner in which service must be made upon the opposite party on a cross-complaint were expressly plead (paragraph 8 of the petition, R. 8; and paragraph 24 of

the petition, R. 17 and 18). It was expressly alleged that the decisions of the courts of last resort of the State of California, in construing the statutory provisions set out in the petition, hold that proper legal service may be made of a cross-action on the adverse party by serving his attorney of record in the manner stated, to-wit, by making service of the papers or instruments either by delivering same personally to the attorney of record for the adverse party, or, in the alternative, if it is made during the attorney's absence from his office, by leaving the notice or other papers with his clerk therein or with the person having charge thereof, etc., and that the said service was made on the cross-action filed by said Montes in said California court on the said Richard F. Bailey as attorney of record for Beaumont Export & Import Company while the cause of action filed by said Texas corporation was still pending therein (R. 8 and 9; and Exhibit B to the petition, R. 24);

(d) That the said service obtained on the Beaumont Export & Import Company, through said service made upon its duly authorized attorney of record, started or set in motion the running of the time within which the said corporation was required to answer, as expressly provided by the laws and decisions of the State of California; which said laws and procedure provided that a default judgment may be entered for failure to answer and plead to such cross-complaint upon the service aforesaid (paragraph 2 of petition, R. 2 and 3); and, therefore, the said court of California, as a basis for and as a condition precedent to rendering the judgment on

the cross-action aforesaid, had thus acquired actual and personal service of notice within its jurisdiction upon the said Beaumont Export & Import Company while the said company and its duly authorized attorney of record were both within the territorial jurisdiction of said court (paragraph 2 of petition, R. 3);

(e) The time within which the laws of California required the Texas corporation to answer having expired, and no answer in its behalf having been filed to said cross-action, the attorneys for Montes filed of record notice that on a certain day and at a certain hour they would move the court for an order to enter the default of the said Texas corporation for failure to appear and answer or plead to the said cross-complaint, and thereupon duly served upon the said Richard F. Bailey a true copy of such notice and the said Bailey acknowledged receipt thereof by signing the original (paragraph 5 of petition, R. 4 and 5). Said Bailey failing to appear at the time and place stated for a hearing on the motion for a default judgment, he was again notified and given ample opportunity to answer thereto, and at Bailey's request the hearing on said motion was continued to another date set, and thereafter another continuance thereof was granted at his request, and finally on May 24, 1933, judgment in favor of the said Montes against the Beaumont Export & Import Company on said cross-action was duly rendered and entered by the court (paragraph 5 of the petition, R. 5 and 6);

(f) Having been again notified of the entry of said judgment by the clerk, the said Richard F. Bailey on

the 15th day of November, 1933, served notice upon the attorneys of record for Montes that on the 23rd day of November, 1933, at a certain hour and place, that the Beaumont Export & Import Company would move said court for its order setting aside the default entered on the 24th day of May, 1933, and for permission to file its answer served therewith, stating that the said judgment was entered against the Texas corporation "through the mistake, inadvertence, surprise or excusable neglect of plaintiff and cross defendant's counsel," and that said motion would be based upon the affidavits of certain persons named and filed therewith (paragraph 6 of the petition, and various exhibits mentioned therein, R. 6 and 7);

(g) All of the fact issues relating to whether or not legal and personal service, as required by the statutes and decisions of California had been obtained against the Texas corporation on said cross-action, were thereupon litigated before the California court on said motion to set aside the default judgment, and both parties adduced evidence in the form of affidavits bearing on said fact issues, and the court having found and determined all of said issues in favor of Montes and against the Texas corporation, the question of whether or not there was proper legal service of the cross-action became *res judicata* and binding upon the parties thereto, who were estopped to assert the contrary (paragraphs 6 and 7 of the petition, R. 6 and 7; and paragraph 9 of the petition, R. 9 and 10);

(h) On the 15th day of September, 1930, the Beaumont Export & Import Company was legally dissolved by vote and consent of its officers, directors and stockholders

and a certificate of dissolution duly issued by the Secretary of State of the State of Texas (paragraph 16 of the petition, R. 13), and at the time of its dissolution William Saenger was its president and its directors were: William Saenger, P. P. Butler, W. H. Garretson, H. A. Perlstein and Charles H. Weinbaum, and that the said president and directors thereupon became, under the laws of Texas, and still are, trustees of the creditors and stockholders of said Beaumont Export & Import Company, and were, as such trustees, and by virtue of their actual acceptance of the trust, and no receiver ever having been appointed, invested with all the power and authority as expressly provided by the statutes, laws and decisions of the State of Texas, and that they have thus had and exercised full charge, control and possession of the assets belonging to said company, of the alleged value of one hundred forty-two thousand five hundred dollars, ($142,500.00) (paragraph 17 of the petition, R. 14);

(i) The legal life of the Beaumont Export & Import Company was, under the laws of Texas, after its dissolution, extended for a period of three years thereafter, with the power and authority to sue and be sued, and that during the said three-year period from September 15, 1930, the date of its dissolution, the said statutory trustees and the corporation were legally identical with respect to the said service had on the cross-action in the California court and with respect to the authority of Richard F. Bailey to represent them in said court, and that his authorized acts in requesting and obtaining two continuances and postponements of the hearing of the motion to enter

judgment by default, operated as a waiver against the statutory trustees and the corporation of any alleged defect or lack of original service obtained on the cross-action (paragraph 13 of petition, R. 12);

(j) That after the said voluntary dissolution of the Texas corporation, its statutory trustees continued to prosecute the cause of action filed by the Beaumont Export & Import Company before its dissolution against the said Montes, permitting the said cause of action to remain on the docket of said court, and retained and authorized the said Richard F. Bailey as their attorney to enter their appearance in the said California court and to file in the name of the Beaumont Export & Import Company their motion to set aside the default judgment and to litigate therein the fact issues relating to the validity, under the California law, of the original service on the cross-action, and that they thereby waived any defect of service (paragraph 13 of petition, R. 12), and were estopped to assert any lack of service by the judgment of the California court after full hearing of evidence on the fact issues, denying the motion to set aside the default judgment against the Beaumont Export & Import Company, and that the said judgment was *res judicata* of all issues actually litigated and that could or should have been litigated in said trial (paragraphs 11 and 12 of petition, R. 11 and 12);

(k) On the 15th day of September, 1933 (three years after the dissolution), the Beaumont Export & Import Company became defunct and not authorized by the law of Texas either to sue or be sued (paragraph 9 of petition, R. 9), and thereafter, to-wit, on the 15th day of November, 1933, the said statutory trustees of the Beaumont Export & Import Company authorized and directed

the said Richard F. Bailey to file a motion in the name of the Beaumont Export & Import Company to set aside the said judgment on the cross-action, as heretofore alleged, and thereby either wilfully or inadvertently perpetrated a fraud upon the said California court in designedly or negligently concealing from the said court and from the said Montes and his attorneys, and in failing to make known to them the fact that the said corporation had been dissolved for a period of more than three years prior to the filing of said motion, and that thereby the said statutory trustees became and were the real parties in said suit and motion to set aside the default judgment and prosecuted and defended as aforesaid in the name of the Beaumont Export & Import Company merely as a convenience for themselves and for their own benefit or for the joint benefit of themselves and the other stockholders of said corporation, and are estopped to assert the contrary (paragraph 11 of petition, R. 11).

4. The said statutory trustees retained the said Bailey and authorized him to enter their general appearance in the said California court, to file their motion in the name of the Beaumont Export & Import Company to set aside the default judgment and for an order of the court permitting them to file their answer to the said cross-action, and authorized their said attorney to litigate all issues arising out of or pertaining to said motion; and the motion duly filed and the notice thereof given by the said Bailey in pursuance of his authority, as alleged in the petition, and as shown by the record in the California court, among other things stated:

> "Said motion will be made on the following grounds, to-wit: That said judgment was entered against plaintiff and cross defendant by mistake, inadvertence, surprise or excusable neglect of plaintiff's

and cross defendant's counsel" (paragraph 6 of petition, R. 6 and 7; and Exhibit G to petition, R. 28 and 29).

The affidavit attached to the answer filed by Bailey to said cross-complaint, in pursuance of his said authority from his clients, contained the following:

> "Richard F. Bailey, being duly sworn, deposes and says: That he is the attorney of record for the Beaumont Export & Import Company, a Texas corporation," etc. (R. 35.)

5. On the said motion filed by the Beaumont Export & Import Company to set aside the default judgment against it, issue was joined by both parties and all of the fact issues relating to whether or not proper service and notice, as required by the laws of California, had been obtained upon the Beaumont Export & Import Company through its attorney of record, Bailey, were duly litigated before the said Superior Court of California by the introduction in evidence before the court by both parties of affidavits of various witnesses in support of their respective contentions. (Petition, paragraphs 6 and 7, R. 6 and 7; affidavit of Richard F. Bailey, Exhibit H, R. 29 to 31; affidavit of Adolph H. Levy, Exhibit I, R. 21 and 32; affidavit of Lucile Holder, Exhibit J, R. 32 and 33; affidavit of W. M. Eggeman, Exhibit L, R. 36 and 37; affidavit of Clore Warne, Exhibit M, R. 38 to 43; counter-affidavit of Richard F. Bailey, Exhibit N, R. 43 to 45; counter-affidavit of Clore Warne, Exhibit O, R. 46 and 47.)

The California court having heard and considered the above evidence on the fact issues tendered and litigated by the parties, found the facts against the Beaumont Export & Import Company and overruled its motion to set aside the default judgment, and the court thereby found and

determined, both expressly and by necessary implication, all of said issues of fact with respect to the proper legal service, under the laws and decisions of California, in favor of said Montes and against the said corporation. (Petition, paragraph 9, R. 9 and 10; order of court denying the motion to set aside default judgment, as shown in Exhibit P, R. 47; and as shown by entry on the court docket as of December 12, 1933, R. 49.)

6. Said Court of Civil Appeals of Texas disposed of the whole case before it by attempting to construe the statutes and decisions of California relating to what the laws of that state required as to service on a cross-action, in the circumstances alleged in the petition, erroneously holding that the Texas corporation was not within the jurisdiction of the said California court, and that, therefore, it was necessary, under the California laws in order to meet the requirements of legal service, that a citation be issued and served personally upon the corporation, and in so holding that court ignored and disregarded the allegations of the petition showing that the Beaumont Export & Import Company was at all times present and within the jurisdiction of the California court through Bailey, its duly authorized attorney of record, and in filing in said court its cause of action against Montes; that for said reasons the Beaumont Export & Import Company was thus at all times present and within the jurisdiction of said court until it became defunct on the 15th day of September, 1933, by virtue of the Texas statutes extending its corporate existence for three years from its dissolution; and that thereafter its statutory trustees voluntarily submitted themselves to the jurisdiction of said court through their attorney, Bailey, whom they authorized to enter their general appearance in the name

of the corporation to set aside the judgment aforesaid (Opinion by Court of Civil Appeals, R. 67, 68).

Notwithstanding the case was before the Court of Civil Appeals exclusively on the sustaining of the general demurrer, that court presumed to find as a fact that neither the Texas corporation nor its statutory trustees ever voluntarily submitted themselves to the jurisdiction of the California court through Bailey, their attorney of record, though the allegations of the petition and the records of said cause in the California court affirmatively show the contrary. On this point the court, in its opinion, said:

> "It is well settled that a judgment rendered in one state against a resident of another state, who was not served with process and did not appear in the action, either personally or by authorized attorney, is not valid or binding out of the state where rendered, although the attempt to acquire jurisdiction may have been in a mode recognized as sufficient and valid by the laws of the state where the judgment was rendered" (court's opinion, R. 70).

In this statement the court properly holds, at least by necessary implication, that if the corporation or its statutory trustees "appeared in the action by authorized attorney," such voluntary appearance would *ipso facto* give the court jurisdiction.

All of the errors hereinafter urged as "Reasons for Allowance of Writ" and all those presented in the attached supporting brief were duly presented by petitioner to all of the Texas courts having jurisdiction thereof, and all of such contentions were overruled and denied. The details of the manner in which all of said issues were duly presented and urged in the Texas courts are shown under the heading of Jurisdiction, paragraph 4, of the supporting brief (page 27).

II.

REASONS FOR ALLOWANCE OF WRIT.

1. The controlling issue in the case, as set forth in the petition and as duly presented to the Texas courts consisting of the District Court, the Court of Civil Appeals and the Supreme Court, was that the said statutory trustees of the dissolved and then defunct Beaumont Export & Import Company, in voluntarily entering and submitting themselves to the jurisdiction of the said Superior Court of California by authorizing their attorney, Bailey, to file a motion to set aside the judgment theretofore rendered by that court, and by the act of their said attorney in filing the said motion in the name of said corporation, and in actually litigating all of the fact issues relating thereto, were bound by the action of the court in determining all of said fact issues against them and in denying their motion to set aside the judgment, whereby the said original judgment on the cross-action and the judgment of the court in denying the motion to set it aside became *res judicata* of all issues that were actually and those that could and should have been litigated therein; and the said statutory trustees were thereby estopped to assert the contrary.

Therefore, the Texas courts erred in refusing to apply the well established principle of *res judicata* and thereby denied petitioner his constitutional right to have his judgment given that "full faith and credit" required by Article IV, Section 1, of the Constitution of the United States. Some of the decisions directly in point by the

Supreme Court of the United States and by various State courts of last resort are:

Chicago Life Insurance Company v. *Cherry*, 244 U. S. 25, 37 S. Ct. 492, 61 L. Ed. 966,
York v. *State of Texas*, 137 U. S. 15, 11 S. Ct. 9.
Tatum v. *Maloney*, 234 N. Y. Supp. 614.
Grantier v. *Rosecrance*, 27 Wis. 488, (Supreme Court).
Burdette v. *Corgan*, 26 Kan. 102 (Sup. Ct.).
Anderson v. *White*, 32 Wis. 308 (Sup. Ct.).
Hall v. *Wilder Mfg. Co.*, 293 S. W. 760, (Sup. Ct. of Missouri).
Ederheimer v. *Carson Dry Goods Co.*, 162 S. W. 142 (Sup. Ct. of Arkansas).

2. Though petitioner by his briefs and oral argument duly presented the said issue of *res judicata* and estoppel to all of said Texas courts, the said Court of Civil Appeals arbitrarily refused judicially to determine it, but deliberately dodged said issue by wrongfully presuming to construe the statutes and decisions of California as to their requirements for proper service on a cross-action, and by construing the said statutes and decisions differently from the construction the California courts of last resort put upon them, as alleged in the petition, and in concluding that adequate service on the cross-action had not been obtained; and presumably held that for said alleged lack of proper original service, the question of *res judicata* became immaterial. The denial by the Supreme Court of the application for writ of error for want of jurisdiction was, under the Texas laws prescribing the jurisdiction of the Supreme Court, equivalent to an express holding by the Supreme Court that the opinion and judgment of the Court of Civil Appeals were correct

(Article 1728, Section 6, Revised Civil Statutes of Texas for 1925, copied in appendix).

In arbitrarily refusing judicially to determine and apply the said principle of *res judicata* and estoppel, the Texas courts wrongfully deprived petitioner of his constitutional right as a litigant to have the courts expressly to pass on all material issues, when such judicial action is properly invoked. That such is an established right of a litigant has been definitely settled by decisions of the Supreme Court of the United States and of the Supreme Court of Texas, some of these decisions being:

Lawrence v. *State Tax Commission of State of Mississippi*, 280 U. S. 276, 52 S. Ct. 556.

Southern Pacific Co. v. *Walters*, 221 S. W. 264 (Supreme Court of Texas).

Harris County v. *Charlton, County Treasurer*, 243 S. W. 460 (Supreme Court of Texas).

Greathouse v. *Fort Worth & Denver City Ry. Co.*, 65 S. W. (2d) 762, 766 (Com. App. of Texas, Section B).

3. In presuming to construe the California statutes prescribing the mode and manner of obtaining service on a cross-action, and in construing the said statutes differently from what was alleged in the petition to be their construction and application by the California courts of last resort, the Court of Civil Appeals was clearly and erroneously outside the issues before it as presented by the appeal from the sustaining of the general demurrer, for that, the Texas courts do not take judicial cognizance of the laws of other states, but such laws must be alleged

and proved as all other ultimate facts constituting a cause of action; and, therefore, the respondents by their general demurrer admitted the truth of the allegations of the petition setting out the statutes of California and citing the California decisions construing said statutes, and further admitted the truth of the allegations showing proper service on the cross-action in accordance with said California statutes and their construction by the California courts.

Some of the Texas decisions holding that the laws of other states must be alleged and proved as any other facts are:

Porcheler v. *Bronson,* 50 Tex. 555, 561.

American National Bank of Oklahoma v. *Garland,* 235 S. W. 562, 563 (Com. App. of Texas).

Van Natta v. *Van Natta,* 200 S. W. 907, 908, (Texas Ct. Civ. App.), writ of error refused by the Supreme Court of Texas.

Some of the decisions by the Supreme Court of the United States and by the Supreme Court and Courts of Civil Appeals of Texas holding that a general demurrer admits the truth of the allegations stating the law of a sister state and the truth of all other allegations sufficiently plead are:

Hanley v. *Donoghue,* 116 U. S. 1, 6 Sup. Ct. 242, 245.

Reasoner v. *Gulf C. & S. F. Ry. Co.,* 203 S. W. 592 (Sup. Ct. of Texas).

De Everett v. *Henry,* 67 Tex. 402, 3 S. W. 566 (Sup. Ct. of Texas).

Bigham Bros. v. *Port Arthur Canal & Dock Co.,* 97 S. W. 686, 689 (by Sup. Ct. of Texas).

Western Union Telegraph Co. v. *Ashley,* 137 S. W. 1165 (Tex. Ct. Civ. App.) writ of error denied by Supreme Court of Texas.

4. Even if the question of what the California statutes required for proper service on a cross-action had been before the Texas Court of Civil Appeals for its decision, the construction of the California statutes by the Texas Court of Civil Appeals was clearly erroneous, as applied to the instant case, in that, the court indulged in an assumption contrary to fact that the Beaumont Export & Import Company and its statutory trustees were not within the jurisdiction of the California court through Bailey, their authorized attorney of record, whereas, the petition affirmatively alleges and shows that they did voluntarily enter and submit themselves to the jurisdiction of that court through their said authorized attorney, and that thereby they "appeared and authorized an appearance" in said court, and, therefore, came within the exception expressly stated by the Court of Civil Appeals to the general rule that "no state can extend its jurisdiction over a person who is not a resident of such state and not within its limits at the time, and who does not appear or authorize an appearance" (opinion by Court of Civil Appeals, R. 70).

The general principle covering this point is accurately stated by Freeman in his work on Judgments, in the following language:

> *"If a person authorizes an action to be instituted in another state in his behalf, he becomes thereby subject to any judgment which may be taken against him in that suit. So, a defendant, without going into a state, may submit himself to its jurisdiction by authorizing someone to appear for him there. In such case a judgment subsequently entered is obligatory upon him. Thus, a foreign corporation by making a*

general appearance in an action against it, thereby submitted to the jurisdiction and cannot attack the judgment for lack of jurisdiction over it." *Richardson & Boynton Co.* v. *Utah Stove & Hdw. Co.*, 28 Utah 85, 77 P. 1. See cases cited in support of the text, Freeman on Judgments, Section 1381, at page 2855; also Volume 3, Freeman on Judgments (5th Ed.), Section 1414, at page 2915.

5. The construction volunteered by the Court of Civil Appeals of the California statutes prescribing the requirements of service on a cross-action in that state is contrary to the construction of said statutes by the California courts of last resort as that construction is affirmatively alleged in the petition; and in refusing to adopt and apply the said construction thereof by the California courts of last resort, the Texas Court of Civil Appeals has avoided its duty to give the California judgment that "full faith and credit" required by Article IV, Section 1, of the Constitution of the United States of the tenor following:

> "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

The above mentioned statutory provisions of California as plead and set out verbatim in the petition, to-wit. Section 442 (R. 18), Section 1011 (R. 8), and Section 1015 (R. 18), comprise all of the California statutory law relating to the requirements for adequate service on a cross-action, and said statutes have been construed as affirmatively alleged in the petition (paragraph 8 of petition, R. 8, and paragraph 24 of petition, R. 17 and 18) by the California courts of last resort to mean that where foreign corporations or residents of another state have entered their appearance through authorized attorney of record in a California court, proper and ade-

quate service may be made on a cross-action against them by serving a copy of the cross-action and notice thereof on such attorney of record. The following decisions by the California courts so hold:

Lowe v. *Superior Court* (S. Ct. of California), 134 P. 190, 165 Cal. App. 708.
Wood v. *Johnston*, 8 Cal. App. 258, 260.
Ritter v. *Braash*, 11 Cal. App. 258, 104 P. 592.
Farrar v. *Steenbergh*, 173 Cal. Rep. 94, 159 P. 707.

WHEREFORE, your petitioner respectfully prays that the writ of certiorari issue in usual form directed to the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas at Beaumont commanding that court to certify and to send to this court for review a full and complete transcript of the record and all proceedings in cause numbered and entitled on its docket No. 2988, Estaban Adam, appellant, vs. William Saenger, *et al.*, appellees, and that the judgment of said Court of Civil Appeals be reversed and rendered as to the issue of whether or not the first amended original petition to which the general demurrer was sustained by all the Texas courts states a cause of action, in accordance with the foregoing petition for certiorari, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just.

M. G. ADAMS,
Counsel for Petitioner.

I certify that I have examined and am familiar with the contents of the foregoing petition for writ of certiorari; that in my opinion it is well founded and entitled to favorable consideration by the court, and that it is not filed for the purpose of delay.

M. G. Adams.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF COURTS BELOW.

The judgment of the District Court of Jefferson County, Texas, sustaining the general demurrer to said first amended original petition, dated December 3, 1935, is shown at R. 57-58; but there is no written opinion by the District Court.

The opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, sustaining the judgment of the District Court, is found at R. 65-71; the judgment rendered by that court on January 28, 1937, at R. 71; but the case is not yet reported.

JURISDICTION.

1. The jurisdiction of this court is based primarily upon U.S.C.A., Title 28, Section 344(b), and specifically upon the fact that petitioner specially set up and claimed his right under the "full faith and credit" clause, Article IV, Section 1, of the Constitution of the United States, and the denial of said right by the Texas courts, as more definitely shown in his attached petition for writ of certiorari.

2. Petitioner exhausted all of his remedies and appellate rights provided by the statutes and laws of Texas, as shown by the following:

After the adverse judgment by the District Court, petitioner perfected his appeal to the Court of Civil Ap-

peals for the Ninth Supreme Judicial District of Texas, this being the court having appellate jurisdiction of said cause (R. 58).

He duly filed his assignments of error, consisting of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Assignments (R. 59-64), by incorporating said assignments of error in a typewritten brief, as provided and permitted by the Texas statute and by the rule of the said Court of Civil Appeals, and filed said brief in the said court within the time provided by law, also presented oral argument, and the said court considered and passed on said appeal, as shown by its opinion (Articles 1844, 1846 and 1757 of the Revised Civil Statutes of Texas for 1925, copied in the Appendix.)

Said Court of Civil Appeals entered its judgment on January 28, 1937, and on February 9, 1937, petitioner filed his application for rehearing (R. 72-74) and his amendment to said application (R. 74-75), which said filing was within the time required by Texas statutes (Article 1877, Revised Civil Statutes of Texas for 1925, copied in the Appendix).

On February 17, 1937, the Court of Civil Appeals overruled said motion for rehearing and the amendment to said motion (R. 75).

The filing of the motion for rehearing being the final remedy in the Court of Civil Appeals, as provided by the Texas statute, the petitioner, on March 13, 1937, filed with the clerk of the said Court of Civil Appeals his application to the Supreme Court of Texas for writ of error and deposited with said clerk a true copy of the application and notified the attorney of record for re-

spondents of the depositing of said copy, as provided by the Texas statutes (Article 1881 of the Revised Civil Statutes of the State of Texas), and the clerk of the said Court of Civil Appeals thereupon, on March 17, 1937, forwarded the original of said application for writ of error to the clerk of the Supreme Court together with the original record of the case and the opinion of the Court of Civil Appeals, etc. (R. 78), and fully complied with the statutory requirements of Texas (Article 1883 of the Revised Civil Statutes of Texas for 1925, copied in the Appendix).

Petitioner's application to the Supreme Court of Texas for writ of error to the Court of Civil Appeals for the Ninth Supreme Judicial District in said cause, as above shown, was filed with the clerk of the Court of Civil Appeals within thirty days from the overruling of the motion for rehearing, as provided by Texas statute (Article 1742, Revised Civil Statutes of Texas, copied in Appendix), and the said application fully complied in all respects with the statutory requirements of Texas (Articles 1740 and 1741 of the Revised Civil Statutes of Texas for 1925, copied in the Appendix), and with the rules of the Supreme Court of Texas, prescribing substantially the same requirements.

On March 31, 1937, the Supreme Court entered its order stating that the said application for writ of error "having been duly considered, it is ordered that the application be dismissed for want of jurisdiction" (R. 79).

By the statement "want of jurisdiction" in the order dismissing the application, the Supreme Court did not

mean that it was without jurisdiction of the cause within the general meaning of that term, but merely that it regarded the judgment rendered by the Court of Civil Appeals as correct, but that it was not satisfied that the said opinion in all respects had correctly declared the law, as provided by the Texas statutes prescribing the "appellate jurisdiction" of the Supreme Court, Article 1728, Section 6, and that part of said Section 6 of the tenor following:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; *in all cases where the judgment of the Court of Civil Appeals is a correct one, but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction."* (Article 1728, Appellate Jurisdiction of the Supreme Court, Sections 1, 2, 3, 4, 5 and 6, of the Revised Civil Statutes of Texas for 1925, copied in the Appendix.)

On April 14, 1937, petitioner filed in the Supreme Court his motion for rehearing on the application for writ of error (R. 79), distinctly specifying the grounds relied on, and otherwise fully complied with the Texas statute, both with respect to the time of the filing of the motion and the contents thereof (Article 1762, Revised Civil Statutes of Texas, copied in Appendix).

On April 28, 1937, the Supreme Court "after due consideration of the motion" overruled it (R. 80).

Petitioner was accorded no further remedy under the statutes and laws of Texas, and thus by the refusal of

the Supreme Court to exercise its discretionary power to review, the judgment entered by the Court of Civil Appeals became the judgment reviewable in the Supreme Court of the United States. *Bacon* v. *Texas,* 163 U. S. 207, 215, 16 S. Ct. 1023, 41 L. Ed. 132; *Sullivan* v. *Texas,* 207 U. S. 416, 422, 28 S. Ct. 215, 52 L. Ed. 274; *San Antonio & A. P. R. Co.* v. *Wagner,* 241 U. S. 472, 477, 36 S. Ct. 625, 60 L. Ed. 1110; "Jurisdiction of the Supreme Court" by Robertson and Kirkham, Section 48, page 84, and cases cited under Note 30.

From said 28th day of April, 1937, therefore, runs the three months' period allowed by law for application to this court for writ of certiorari. 28 U.S.C.A., Section 350; *American Railway Express Company* v. *Levee,* 263 U. S. 19, 44 S. Ct. 11; *Western Union Telegraph Company* v. *Crovo,* 220 U. S. 364, 366, 31 S. Ct. 399, 55 L. Ed. 498; *Norfolk, etc., Co.* v. *Virginia,* 225 U. S. 264, 32 S. Ct. 828, 56 L. Ed. 1082; *Puget Sound Power & Light Co.* v. *County of King,* 264 U. S. 22, 44 S. Ct. 261.

3. The substantial federal question that petitioner was entitled to have the courts of Texas give his judgment rendered by the Superior Court of California that full faith and credit required by Article IV, Section 1, of the Constitution of the United States, was "raised," "specially set up and claimed" and asserted throughout the said cause and at every step of the procedure therein as follows:

In the prayer to his first amended original petition (c) petitioner prayed "that the said judgment be declared and established by this court under the full faith and

credit clause of the Constitution of the United States," etc. (R. 20).

In his first assignment of error (R. 59), and in his ninth and tenth assignments of error (R. 64) filed in the Court of Civil Appeals, he complained and asserted that "the trial court failed to fulfill and comply with its duty expressly prescribed by Article IV, Section 1, of the Constitution of the United States, which was copied verbatim (R. 59, 64).

A copy of the brief duly filed by petitioner in and considered by the Court of Civil Appeals, certified by the clerk of that court, was attached to the certified record sent to the clerk of the Supreme Court of the United States; and the ten assignments of error appearing in the record now before this court (R. 59-65), are verbatim copies of the said assignments of error contained in said brief, as expressly provided and permitted by Article 1844 of the Revised Civil Statutes of Texas for 1925; said article being copied in the Appendix. This is a substantial compliance with the requirements by the Supreme Court of the United States to show that a federal question was raised and the manner in which it was presented to the state courts. *People of State of New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 49 S. Ct. 61.

In his application for rehearing in the Court of Civil Appeals, to-wit, in his first, second and fourth grounds thereof (R. 72, 73 and 74), petitioner specifically claimed and asserted that the Court of Civil Appeals in sustaining the judgment of the trial court had failed and refused "to give that full faith and credit to the public acts,

records and judicial proceedings of the State of California required by said Article IV, Section 1, of the Constitution of the United States" (R. 72).

Also in his application to the Supreme Court of Texas for writ of error to the Court of Civil Appeals, to-wit, in his first assignment (R. 75, 76), fourth assignment (R. 77, 78) and fifth assignment of error (R. 78), petitioner expressly claimed and asserted that the Court of Civil Appeals by its judgment had failed and refused to give and had wrongfully denied him his said constitutional right under the full faith and credit clause of the Federal Constitution; copying verbatim the clause under which he claimed said right (R. 76).

Again, in his motion filed in the Supreme Court for rehearing on the application for writ of error he claimed and asserted in his second assignment of error (R. 79, 80) that the Supeme Court in dismissing his application for the writ for alleged want of jurisdiction, and both of the lower courts, as to all of the errors as shown and set forth in said application for writ of error, had erroneously failed and refused to give the said California judgment that full faith and credit as required by said article and section of the Federal Constitution; the specific provision relied on being copied verbatim (R. 80).

4. All of the reasons relied on for allowance of the writ, as shown in Division II of the petition and which are hereinafter adopted as assignments of error, were distinctly raised and asserted throughout all of the proceedings in the Texas courts, as evidenced by the following:

(a) Reason No. 1 relating to *res judicata* was expressly raised in the petition (paragraph 9, R. 9); was urged in the Court of Civil Appeals in the fifth assignment of error (R. 61); was again urged in the second and third grounds of the motion for rehearing in said court (R. 72, 73); was distinctly presented in the application to the Supreme Court of Texas for writ of error in the first assignment of error therein (R. 75, 76); and finally again urged in the Supreme Court in the motion for rehearing on the application for writ of error, in the first and second assigned errors (R. 79, 80).

(b) Reason No. 2 presenting the error of the Court of Civil Appeals in refusing judicially to determine the issue of *res judicata,* was presented at the first opportunity, to-wit, in the application for rehearing in that court in the third and fourth grounds thereof (R. 73, 74); was again urged in the Supreme Court in the application for writ of error, in the third assignment of error therein (R. 77); and finally urged in the Supreme Court in the motion for rehearing on the application for writ of error in the first and second assigned errors thereof (R. 79, 80).

(c) Reason No. 3 relating to the error on the part of the Court of Civil Appeals in attempting to construe the California statutes relating to requirements of service on a cross-action in that state was distinctly raised and presented at the first opportunity, to-wit, in the application for rehearing in that court, and the fifth ground thereof in the amendment to said application (R. 74, 75); was urged in the application to the Supreme Court for

writ of error in the fourth assignment of error therein (R. 77, 78); and finally urged in the motion for rehearing on the application for writ of error in the first and second assigned errors therein (R. 79, 80).

(d) Reason No. 4 asserting error on the part of the Court of Civil Appeals in presuming to find as a fact that the Beaumont Export & Import Company and its statutory trustees were never present within the jurisdiction of the said California court through their said authorized attorney of record, Bailey, and that, therefore, the service had on the cross-action was insufficient, was raised at the first opportunity, to-wit, in the application for rehearing in that court in the first ground (R. 72), and in the fifth ground in the amendment to the original application (R. 74, 75); also urged in the Supreme Court in the application for writ of error in the fourth assignment of error (R. 77).

(e) Reason No. 5 asserting error on the part of the Court of Civil Appeals in volunteering a construction of the California statutes relating to service on a cross-action and in giving a different construction thereof from that by the California court, was raised at the first opportunity in the application for rehearing in the Court of Civil Appeals, to-wit, the fifth ground, as shown in the amendment to the said application duly filed (R. 74, 75); was again urged in the Supreme Court in the application for writ of error, fourth assignment therein (R. 77, 78); and finally in the motion in the Supreme Court for rehearing on the application for writ of error, first and second assigned errors (R. 79, 80).

STATEMENT OF THE CASE.

For brevity, we here adopt the statement made under the heading of Summary of Matter Involved, Section I, of the petition.

SPECIFICATION OF ERRORS.

To avoid repetition, we here adopt as our "Specification of Assigned Errors" to be urged, the "Reasons for Allowance of Writ," as numbered respectively from 1 to 5, inclusive, and set forth under that heading in Division II of the petition.

POINT ONE.

The case at bar is controlled by the general rule of law that if a litigant enters his appearance in court for any purpose other than expressly and exclusively for contesting the court's jurisdiction, he thereby makes his appearance for all purposes and waives any defect or lack of jurisdiction; and that if he makes his general appearance and puts in issue and litigates the jurisdictional facts and whether or not there had been proper service, the ruling and judgment of the court thereon becomes *res judicata*, which operates as a conclusive estoppel against all subsequent denials or litigation thereof.

The pleading and the attached exhibits of the certified record in the Superior Court of California conclusively show that the motion filed by respondents to set aside the judgment was not even for the purpose of contesting jurisdiction, but admitted jurisdiction of the court

and contended merely that the judgment ought to be set aside on account of the excusable neglect of Richard F. Bailey, their authorized attorney of record in said suit. In this motion the only ground for setting aside the judgment was stated as follows:

> *"Said motion will be made on the following grounds, to-wit: That said judgment was entered against said plaintiff and cross defendant through the mistake, inadvertence, surprise or excusable neglect of plaintiff's and cross defendant's counsel"* (Exhibit G to petition, R. 29).

At the same time the respondents filed their answer to said cross-complaint, in the verification to which appears the following:

> *"Richard F. Bailey, being first duly sworn, deposes and says: That he is the attorney of record for the Beaumont Export & Import Company, a Texas corporation," etc.* (Exhibit K to petition, R. 35).

In *Chicago Life Insurance Company* v. *Cherry*, 244 U. S. 25, 37 S. Ct. 492, the Supreme Court of the United States, in an opinion delivered by Mr. Justice Holmes, stated the law on the point as follows:

> "This is a suit in Illinois upon a judgment recovered in Tennessee against the insurance company, plaintiff in error. They pleaded and set up at the trial that there never was valid service upon them in Tennessee and that the judgment was void. The defendant in error (the plaintiff) showed in reply, without dispute, that the defense was urged in Tennessee by pleas in abatement; that, upon demurrer to one plea and upon issue joined on the other, the decision was for the plaintiff; and that the judgment was affirmed by the higher courts. The plaintiff

had judgment at the trial in Illinois, the judgment was affirmed by the appellate court, and a writ of certiorari was denied by the Supreme Court of that state. The insurance companies say that the present judgment deprived them of their property without due process of law.

"The ground upon which the present judgment was sustained by the appellate court was that, as the issue of jurisdiction over the parties was raised and adjudicated after full hearing in the former case, it could not be reopened in this suit. The matter was thought to stand differently from a tacit assumption or mere declaration in the record that the court had jurisdiction.".

The Supreme Court affirmed the judgment, saying:

"If the Tennessee judgment had been declared void in Illinois, this court might have been called upon to decide whether it had been given due faith and credit. But a decision upholding it upon the ground taken in the present case does not require us to review the Tennessee decision or to go further than we have gone."

Another statement made by the Supreme Court in that decision is applicable to the case at bar, to-wit:

"If a statute should provide that filing a plea in abatement, or taking the question to a higher court, should have that effect (of proper party submitting itself to court's jurisdiction) it could not be said to deny due process of law. *The defendant would be free to rely upon his defense by letting judgment go by default. York* v. *Texas*, 137 U. S. 15, 11 S. Ct. 9, 34 L. Ed. 604; *Western Life Indemnity Co.* v. *Rupp*, 235 U. S. 261, 35 S. Ct. 87, 59 L. Ed. 220."

Hall v. *Wilder Manufacturing Company* (Supreme Court of Missouri), 293 S. W. 760, was a suit brought

upon a judgment *in personam* rendered by the Supreme Court of New York. The Supreme Court of Missouri said:

> "The error assigned by defendant falls under two general heads. The first is that the trial court erred in sustaining the validity of the judgment rendered by the New York court, it being the contention that the court did not acquire jurisdiction over defendant; and the second is that error was committed in striking out the counter-claim set up by defendant.
>
> "Coming first for consideration in this case is the effect of the fact of express adjudication by the New York court that jurisdiction of the defendant had been obtained in the original suit. The general doctrine, that, in a suit brought in one state upon a judgment rendered by a court of another state, the jurisdiction of the court rendering such judgment may be challenged, is not disputed by counsel for plaintiff. Such is the settled doctrine."

The court then stated that the jurisdiction of the New York court rested upon the fact issue as to whether or not the corporation was doing business in that state and that it was a question of due process of law under the constitution of the United States; and proceeding the court said:

> "Does the express determination of the New York court that it had jurisdiction preclude inquiry into that question here? *The contention is that the express adjudication is res adjudicata and cannot be reopened by the defendant.*
>
> "*It is a principle well settled and of general application that, where a question proper for judicial determination is directly put in issue, and finally determined in a legal proceeding by a court having competent authority and jurisdiction to hear and determine the question, such decision and determina-*

tion of the question will be deemed final and conclusive upon the parties and their privies, in all further litigation between them in which the same question arises, so long as the judgment remains unreversed or is not otherwise set aside.

"We are bound in a proper case to give effect to the full faith and credit clause of the federal constitution. The defendant having invoked a direct determination of the question of jurisdiction over it in the New York court, had a full hearing upon that question, and, having permitted an adverse decision to stand, we must give to the decision of the New York court upon that question the same effect as would be given to that determination within the State of New York, or the same force and effect as if it had been rendered by a Missouri court. Tootle v. *Buckingham,* 190 Mo. 183, 88 S. W. 619; *Harding* v. *Harding,* 198 U. S. 317, 25 Sup. Ct. 679, 49 Law. Ed. 1066; *Howey* v. *Howey* (Mo. Sup. Ct.), 240 S. W. 450. 455. *The New York court having determined the question upon that evidence, at the instance of defendant, the ruling is not subject to collateral attack here, under the claim that the New York court erred in its opinion. Tootle* v. *Buckingham, supra.*

"The test of jurisdiction is, whether the court has power to enter on the inquiry, and not whether its decision is right or wrong." *Hagerman* v. *Sutton* (Mo.), 4 S. W. 77.

"Having procured the New York court to exercise its power upon the question of jurisdiction over the person of defendant and to enter into an authorized inquiry as to such jurisdiction and directly determine that question before proceeding to judgment upon the merits, the defendant submitted itself to that court for the determination of that question, taking the chance that an adverse ruling, unreversed and not appealed from, would preclude inquiry into the same question when sued upon the judgment in the court of another state.

"If we are going to measure the judgment rendered in the New York court by the rule applicable to a domestic judgment, then the defendant who sought and had his day in court to procure an express adjudication of the question whether the court had jurisdiction over his person, met with an adverse decision on that issue upon the appeal of the plaintiff, and permitted that decision to stand unreversed and without appeal, cannot have that question reopened upon the ground that the court of the other state erred in its opinion upon the facts submitted. In such situation, we must take the judgment of the New York court at the same value as if rendered by one of our own courts. Tootle v. *Buckingham, supra."*

The pleadings in the case at bar show that the judgment rendered by the California court in adjudicating the jurisdictional facts was not appealed from by respondents, but that such adjudication became a final judgment (paragraph 3 of petition, R. 3).

The case of Hall vs. Wilder Manufacturing Company cites and discusses many analogous cases, and the opinion is a thoroughly reasoned discussion on the subject.

In the case of *Ederheimer* v. *Carson Dry Goods Company* (Supreme Court of Arkansas), 152 S. W. 142, a St. Louis firm of merchants sued the appellee in Arkansas, being an Arkansas corporation, on a judgment obtained by appellants against appellee in the Circuit Court of the City of St. Louis, Missouri. The defense was that the Circuit Court, where the judgment was obtained, was without jurisdiction. The appellee alleged that "no service of summons or process in said suit in the Circuit Court of the City of St. Louis, State of Missouri, has ever been had on this defendant," etc.

The appellee filed in the Circuit Court of St. Louis a motion to quash the alleged service, but the motion was overruled. The trial court permitted appellee, over the objection of appellants, to show that it was a non-resident of Missouri; that it is not doing business or authorized to do business in that state; that at the time of service of summons on Ike Felsenthal he was not transacting business for the appellee; and that he was not such an agent of appellee as that service of summons on him in St. Louis would bind appellee. The court found that the Missouri court was without jurisdiction over the person of defendant and that its judgment was void and, therefore, open to collateral attack. But the Supreme Court of Arkansas said:

> *"The record shows that the Circuit Court of St. Louis is a court of general jurisdiction and had jurisdiction of the subject-matter, and the only question presented for our decision is whether or not the finding and judgment of the Circuit Court of Missouri, holding that it had obtained jurisdiction by proper service upon appellee, is res adjudicata.*
>
> "The appearance of the appellee in the Missouri Circuit Court for the purpose of quashing the sheriff's amended return of service of summons in that cause gave that court jurisdiction of the person of appellee for the purpose of quashing service, not only upon the ground stated in the motion, but upon any other ground that the appellee might have presented. The appellee, upon filing the motion to quash the service of summons, could have brought forward any grounds that it saw fit to allege other than that set up in the motion as a reason why service should be quashed. The appellee, having appeared in the Circuit Court of Missouri for the purpose of quashing service, *is estopped, not only from*

setting up the reason for quashing the service alleged in its motion, but also any reasons that it might have set up as grounds for quashing such service. The issue raised by the motion was whether or not the Missouri Circuit Court had jurisdiction of the person of appellee, and it was the duty of appellee, when it questioned that jurisdiction, to bring forward any cause that might have existed showing that the court did not have jurisdiction of the person of appellee.

"Not having brought forward such matters then, it is estopped from taking advantage of them in a subsequent proceeding to test the jurisdiction, and the judgment of the court on that question, whether right or wrong, is not subject to collateral attack on review by the Circuit Court of another jurisdiction.

"The judgment of a court of competent jurisdiction operates as a bar to all defenses, either legal or equitable, which were interposed or could have been interposed in the suit.

"Until the appearance of appellee in the Missouri court to quash service of summons, no issue was raised by it. It was not before the court at all for any purpose, unless it had been properly served with process; and, while it was the duty of the Circuit Court of Missouri to examine the service to determine whether it had jurisdiction of the person of appellee, there was no issue on that question raised by appellee. But when appellee appeared and moved to quash, it distinctly raised that issue with all the reasons that were, or could have been, urged as to why the Circuit Court had not acquired jurisdiction of the person of appellee.

"As was said in *Newcomb* v. *New York Central & H. R. R. Co.*, 182 Mo. 708, 81 S. W. 1073: 'If the defendant was of the opinion that the return was not sufficient to bring it into court and had confidence in its own opinion, it could have remained away and let the plaintiff take his course; that was

a station in the progress of the case where the law requires the party to rely on his own judgment and take the risk of being sustained in the end.'"

In the case at bar, it should be specially noted that the respondents did not make the contention in the California court that Richard F. Bailey was not their duly authorized attorney of record, either for the purpose of accepting original service on the cross-action or for filing and litigating the motion to set aside the judgment on the cross-action. On the contrary, the motion filed by Bailey in the Superior Court of California to set aside the judgment based it on the express ground that he himself as the duly authorized attorney had been guilty of neglect, but that his neglect in the circumstances was excusable; and all of said questions of fact were put in issue and litigated before that court with the result as heretofore stated.

In *Tatum* v. *Maloney,* 234 N. Y. Supp. 614, it was held that defendants having retained attorneys in another state to appear specially for them in an action against defendants in that state to contest the court's jurisdiction, were bound by the action of such attorney in the conduct of the litigation even though such attorney exceeded the limitation placed upon him by his client and appeared generally. The court held that when a defendant, for the purpose of contesting the court's jurisdiction, appears and submits the matter for adjudication, he is bound by the result; *and that the judgment of the Supreme Court of Mississippi that defendant by moving in the lower court to set aside default judgment thereby makes general appearance and authorizes entry of judg-*

ment against him, was entitled to full faith and credit in the courts of New York under the full faith and credit clause of the Federal Constitution.

In *Grantier* v. *Rosecrance,* 27 Wis. 488 (Supreme Court of Wis.), the Supreme Court of Wisconsin held that filing motion to set aside default judgment on ground that the record did not show legal service upon him or that it showed no service and that the complaint did not state a cause of action constituted a general appearing for all purposes of the suit and that adjudication thereon by the trial court constituted an estoppel on the principle of *res adjudicata.*

In *Burdette* v. *Corgan,* 26 Kan. 102, it was held that defendant must challenge the judgment on the single ground of jurisdiction, otherwise his appearance would be construed as general and for all purposes of the suit.

In the instant case it has been shown that the petition alleges, and the record in the Superior Court of California conclusively shows, that respondents in the case at bar filed their answer to the merits of the cross-action at the same time it filed its motion to set aside the judgment on the cross-action on the single ground that the neglect of its attorney in not answering the cross-action and litigating it at the proper time was, in the circumstances, excusable.

An accurate and complete statement of the law on this subject, with copious citations of supporting cases, is made by the author Beale in his exhaustive work, The Conflict of Laws, in Volume 2, Section 450.9, at pages 1424 and 1425, of the tenor following:

"Res Judicata of Jurisdictional Fact. The judgment of a sister state is presumed to be valid; and if no defect of jurisdiction appears on the record it will be taken as valid in the absence of evidence to the contrary. But evidence will always be admitted to disprove a jurisdictional fact, that is, a fact upon which the judgment of the foreign court was based. Such a fact commonly put in issue is that of domicile.

"Nevertheless, if the jurisdictional fact was litigated by the defendant in the foreign action and found against the defendant, the question of jurisdiction becomes res judicata, and cannot be relitigated; even if in the foreign action it was put in issue by a special appearance to deny jurisdiction, and was relitigated upon that. In Degge vs. Baxter it appeared that plaintiff got judgment against defendant in Virginia, and later brought suit on the judgment in the District of Columbia; the defendant pleaded that the Virginia judgment was rendered without jurisdiction, and the question was litigated, and it was found against the defendant. The plaintiff now sues in Colorado on the judgment rendered in the District of Columbia. The defendant cannot here set up the defense of lack of jurisdiction."

The legal effect of the entering of their general appearance in the California court by the statutory trustees through their authorized attorney, Richard F. Bailey, to set aside the judgment and of litigating the jurisdictional facts and of proper service under the California statute is as stated by Freeman on Judgments, Section 1381, at page 2855, to-wit:

"If a person authorized an action to be instituted in another state in his behalf, he becomes thereby subject to any judgment which may be taken against him in that suit. So a defendant, without going into a state, may submit himself to its juris-

diction by authorizing someone to appear for him there. In such case the judgment subsequently entered is obligatory upon him. Thus a foreign corporation, by making general appearance in an action against it, thereby submits to the jurisdiction and cannot attack a judgment for lack of jurisdiction over it. Richardson & Boynton Co. v. *Utah Stove and Hardware Co.*, 28 Utah 85, 77 Pac. 1."

The jurisdictional facts put in issue, in the case at bar, by the motion to set aside the judgment and the evidence adduced in support of said motion, and the controverting evidence, which were conclusively and finally determined by the court's overruling the motion, are as follows:

(a) Whether said Bailey, as attorney of record for the Beaumont Export & Import Company and for the statutory trustees thereof, had been properly served, as required by the California laws, with a copy of said cross-action.

(b) Whether the said Bailey, in his capacity aforesaid, had been served with notice of the motion filed by Montes and his attorney to enter the default of the cross-defendant, Beaumont Export & Import Company, for failure to appear and answer or plead to the cross-complaint.

(c) Whether or not the said Bailey's signature acknowledging receipt of a copy of said notice of motion on the 15th day of April, 1933, was his *bona fide* signature, and whether or not he had actually signed the original of said motion and received a copy thereof.

(d) Whether or not the hearing on said motion to enter said judgment by default was continued or post-

poned on two different occasions at the request of said Bailey in his capacity aforesaid; and

(e) All of the fact issues relating to proper service that could and should have been put in issue, litigated and determined by the court in passing upon and rendering its final order in granting or refusing the cross-defendants' motion to set aside default judgment.

The California court having heard all the evidence on the litigated fact issues aforesaid, denied the said motion to set aside the default judgment. (Paragraph 9 of Petition, R. 9, 10; and the various exhibits to petition showing the evidence adduced by both parties in litigating the issue of proper service under the California law, R. 28-33 and R. 36-47.)

By this action the California court found and determined, both expressly and by necessary implication, all of said issues of fact with respect to the proper legal service under the laws and decisions of California, in favor of said Montes and against the said Beaumont Export & Import Company and its statutory trustees and successors, who litigated said issues in the name of the then defunct Beaumont Export & Import Company. Therefore, all of said issues of fact relating to service thereupon became and now are *res judicata* as among the parties, to-wit, Montes and his privies and successors in interest on the one hand, and on the other, Beaumont Export & Import Company and its statutory trustees and successors as named in the petition, all of whom are thereby estopped to assert or maintain anything to the contrary.

POINT TWO.

In evasively refusing expressly to adjudicate and determine the principle of *res judicata* and estoppel, though such judicial action was properly invoked, the Texas courts wrongfully deprived petitioner of a fundamental and constitutional right.

In *Lawrence* v. *State Tax Commission of State of Mississippi*, 280 U. S. 276, 52 S. Ct. 556, the Supreme Court of the United States held that it was the duty of the lower courts, whether state or federal to determine expressly and not by implication the issues properly before them, in the following language:

> *"But the constitution which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on nonfederal grounds, it is the province of this court to inquire whether the decision of said court rests upon a fair and substantial basis. If unsubstantial, constitutional obligations may not be thus avoided."*

The Supreme Court of Texas, in cases other than the one at bar, has established the same principle and declared the identical right of a litigant: *Southern Pacific Co.* v. *Walters* (Sup. Ct. of Texas), 221 S. W. 264; *Harris County* v. *Charlton, County Treasurer* (Sup. Ct. of Texas), 243 S. W. 460; *Greathouse* v. *Fort Worth & Denver City Railway Co.* (Com. App. of Texas), 65 S. W. (2d) 762, 766.

Though petitioner devoted the larger part of his brief filed in the Court of Civil Appeals to this issue of *res judicata* and estoppel, and stressed this point in oral

argument before that court, and complained of the court's refusal to adjudicate this issue in his motion for rehearing therein (third ground, R. 73), and again in his application to the Supreme Court for writ of error specially presented this issue as paramount and controlling of the whole case (first, second and third assignments, R. 75, 77), and finally renewed the said complaint in his motion for rehearing in the Supreme Court (R. 79, 80), the said courts persistently side-stepped, ignored and refused to adjudicate the issue.

POINT THREE.

The Texas courts do not take judicial knowledge of the laws of sister states, but such laws of other states, when relied on, must be plead and proved as any other ultimate facts; and the petition having alleged the statutes of California prescribing the requirements for proper service on a cross-action, and having alleged the construction given to said statutes by the California courts of last resort, the said California laws thereby became necessary ultimate facts to be established by evidence upon trial on the merits; and, therefore, the general demurrer interposed by respondents admitted that the California statutes and their construction by the California courts were as alleged in the petition.

It is an established rule that in a case appealed from a state court, where it is the law of such state that its courts will not take judicial knowledge of the laws of another state involved in the case, the Supreme Court of the United States, in accord with said practice, will also refuse to take judicial knowledge of the laws of such other

state, unless such laws were plead and proved; *and that in such case the general demurrer admits that the laws of the sister state are as alleged in the petition. Hanley* v. *Donoghue,* 116 U. S. 1, 6 S. Ct. 242, 245, *where the Supreme Court of the United States said:*

> *"Whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the laws of that state must be proved like any other matter of fact."*

In *Western Union Telegraph Company* v. *Ashley,* 137 S. W. 1165 (Tex. Civ. App.), writ of error denied by the Supreme Court of Texas, in which the laws of Arkansas relating to the matter involved were plead, the Texas Court of Civil Appeals held:

> *"When appellee obtained a ruling of the court on his demurrer he, in effect, admitted that the law of Arkansas was as alleged by appellant."*

The rule is thoroughly established in Texas, by decisions of the highest courts, that the laws of other states must be alleged and proved as any other facts: *Porcheler* v. *Bronson,* 50 Tex. 555, 561; *American National Bank of Oklahoma* v. *Garland,* 235 S. W. 562, 563 (Com. App. of Texas); *Van Natta* v. *Van Natta,* 200 S. W. 907, 908 (Tex. Civ. App.), writ of error refused by the Supreme Court of Texas.

In the case at bar the fundamental question that was before the Texas courts for their adjudication was whether or not the petition stated a cause of action, and this, under the Texas practice, has always been a pure

matter of law: *Reasoner* v. *Gulf C. & S. F. Ry. Co.*, 203 S. W. 592 (by Sup. Ct. of Texas); *De Everett* v. *Henry*, 67 Tex. 402, 3 S. W. 566; *Bigham Bros.* v. *Port Arthur Canal & Dock Co.*, 97 S. W. 686, 689 (by Sup. Ct. of Texas); *Warner* v. *Bailey*, 7 Tex. 517, 518.

POINT FOUR.

The Beaumont Export & Import Company before its dissolution having entered and submitted itself to the jurisdiction of the California court to file and litigate its suit against Montes, and being at all times represented by authorized attorneys of record, both before its dissolution and after its dissolution, during the period of three years for which its corporate life was extended by the laws of Texas, that is, up to September 15, 1933, the date upon which it became defunct, was at all times personally within and voluntarily submitting to the jurisdiction of said California court, and during that time the said judgment was rendered and entered against it. After the said corporation became defunct, the statutory trustees authorized and directed the same attorney, Bailey, to file, in the name of the Beaumont Export & Import Company, a motion to set aside the said judgment and to litigate in said court all the fact issues relating to proper service, etc., and thereby the said statutory trustees personally entered and voluntarily submitted themselves to the jurisdiction of that court for the purposes aforesaid.

The rule that either an individual or a corporation may, without actually entering another state, submit themselves to the jurisdiction of its courts by retaining and authorizing an attorney either to file or defend a suit and become thereby bound by any action or judgment of

the court, is a principle definitely established. Freeman on Judgments, Section 1381, page 2855, also Volume 3, Freeman on Judgments (5th Ed.), Section 1414, page 2915; *Richardson and Boynton Co.* v. *Utah Stove & Hardware Co.*, 28 Utah 85, 77 Pac. 1.

If the rule were otherwise, individuals and corporations, residents of one state could enjoy all the advantages of the courts of another state and be immune and not subject to any of the disadvantages or chances of litigation.

The Supreme Court of the United States has had occasion in *Pease* v. *Rathbun-Jones Engineering Co.*, 243 U. S. 273, 37 S. Ct. 283, to consider and determine the nature and effect of the Texas statutes upon dissolved corporations, as follows:

> "It is contended that all suits pending against the Peoples Light Company abated upon its dissolution. As we read the Texas statute such a consequence is carefully avoided. It is there provided that upon dissolution the president and directors shall be trustees of the creditors and stockholders of the corporation, 'with full power to settle its affairs' and with power 'in the name of such corporation to collect all debts, compromise controversies, and maintain or defend judicial proceedings.' *This general language makes no distinction between pending and subsequent judicial proceedings which the trustees are empowered to maintain and defend in the corporation's name; and there seems no reason why such a distinction should be read into the statute. There is also the further provision in the article that 'the existence of every corporation may be continued for three years after its dissolution from whatever cause, for the purpose of enabling those charged with the duty to settle its affairs.'*"

This construction of the Texas statutes by the Supreme Court of the United States is in harmony with the construction thereof by the Texas courts of last resort: Revised Civil Statutes of Texas, 1925, Articles 1388-1395; *Burkburnett Refining Co.* v. *Itseng,* 292 S. W. 170 (by Tex. Com. App.); *Butcher* v. *Case Threshing Machine Co.,* 207 S. W. 980 (by Tex. Civ. App.); *Becker* v. *Cooper,* 22 S. W. (2d) 1083 (by Tex. Civ. App).

The statutory trustees of the Beaumont Export & Import Company, after it became defunct, that is, after the expiration of the three-year period that its corporate existence was extended by the Texas statute, authorized the attorney, Bailey, who had been representing the corporation in the said cause pending in the California court, to enter their appearance in said court by filing a motion to set aside the judgment in the name of the said corporation, and either negligently or fraudulently failed to make known to the California court or to Montes' attorneys that the said corporation was defunct; *and by so doing, the said statutory trustees became in lieu of the corporation the actual movants in the litigation in the cause, and they are estopped to assert the contrary*: *Gamer Co.* v. *Gammage,* 241 S. W. 736 (Tex. Civ. App.); *Droege* v. *Emery,* 105 S. W. 374 (by Kentucky Ct. App.). These cases are directly in point. In Gamer Company vs. Gammage, Gamer continued to defend a damage suit against the Gamer Company after that company had been dissolved and after the expiration of the three-year period following its dissolution, and after a period of about eleven years had elapsed and plaintiff's cause of action for damages was barred by limitation as against every-

one except the Gamer Company, the said Charles Gamer then made it known to the court and opposing attorneys that said corporation had been dissolved, and plaintiff then made him a party defendant, whereupon he set up the defense of two-year limitation. The Texas court held that he was estopped to make such a contention; and that as the Gamer Company was non-existent for any purpose after April 28, 1913, it was evident that the defense of the suit was not carried on by the corporation after that date; that it must have been carried on by someone in its name; and that Charles Gamer, who owned practically all of the stock of the company at the time it was dissolved, was the only person interested in carrying on the efense of the suit. The Texas courts cited with approval the Kentucky case, *Droege* v. *Emery, supra*, which is similar in all respects, except only that in the Kentucky case the cause of action was prosecuted to a finality against the dissolved and incompetent corporation, while the Droeges and officers and stockholders of the corporation were in fact defending the suit throughout in the name of the corporation, etc. *In the case at bar this estoppel against the statutory trustees was specially plead* (paragraph 11 of petition, R. 11; paragraph 12 of petition, R. 11, 12; paragraph 13 of petition, R. 12).

Prior to the time the said corporation became defunct, to wit, before the 15th day of September, 1933, said Bailey, as authorized attorney of the corporation, requested and was granted by the court two continuances of the hearing on the motion filed by Montes for an order of the court to enter the default of the cross de-

fendant, Beaumont Export & Import Company, for failure to appear and answer or plead to the cross-complaint, a true copy of which was served upon Bailey. *The legal effect of these continuances granted at Bailey's request was that the Beaumont Export & Import Company and its statutory trustees thereby waived all alleged defects in the original service.* The Texas courts so hold: *Early v. Cornelius,* 39 S. W. (2d) 6 (by Texas Sup. Ct.); *Early v. Cornelius,* 24 S. W. (2d) 757 (by Texas Ct. Civ. App.) *This waiver was expressly alleged* (paragraph 5 of petition, R. 4, 5).

It was also expressly alleged in the petition that with respect to the estoppel and the waiver above mentioned, the laws, jurisprudence and decisions of the courts of last resort of the States of Texas and California are the same (paragraph 14 of petition, R. 13).

POINT FIVE.

In attempting to evade and circumvent the legal effect of the allegations of the petition pleading *res judicata* and estoppel, as aforesaid, and in wilfully refusing to adjudicate said issue, and in attempting to put a different construction upon the California statutes prescribing service on a cross-action from that established by the California courts of last resort, the Texas courts have clearly failed in their duty to give the California judgment that "full faith and credit" required by Article IV, Section 1, of the Constitution of the United States.

As heretofore shown, the petition plead the California statutes relating to service on a cross-action and alleged that *the California courts had construed the said statutes to mean that a cross-action is a pleading in the case, and that serving on the adverse attorney of record of a copy of the cross-action and notice of the filing*

thereof is proper and adequate service. This is the holding in the following California cases: Lowe v. *Superior Court,* 134 P. 190, 165 Cal. App. 708 (S. Ct. of California); *Wood* v. *Johnston,* 8 Cal. App. 258, 260; *Ritter* v. *Braash,* 11 Cal. App. 258, 104 P. 592; *Farrar* v. *Steenbergh,* 173 Cal. Rep. 94, 159 P. 707.

In *Wood* v. *Johnson, supra,* the California court construed the California statutes here involved as follows:

> "Section 442, Code of Civil Procedure, as amended by act approved March 20, 1907 (Stats. 1907, p. 706), provides that 'whenever the defendant seeks affirmative relief against any party to the action,' etc. (the amendment consists in adding the last three words italicized after the word 'party'), he may, in a proper case, file a cross-complaint, which must be served upon the parties affected thereby. There is nothing contained in the section which indicates how the service may be made upon such party. By reference, however, to Section 465, Code of Civil Procedure, we find that 'all pleadings subsequent to the complaint must be filed with the clerk and copies thereof served upon the adverse party, or his attorney.' *By the express provisions of Section 422, Code of Civil Procedure, as amended by act approved March 20, 1907* (Stats. and Amendts. to Codes, 1907, p. 705), *the cross-complaint is designated as a pleading on the part of the defendant. This being true, it follows that the service is sufficient under said Section 465 if made upon either the adverse party or his attorneys.* In the case at bar, the written acknowledgment of service of the cross-complaint indorsed thereon and signed by plaintiffs' attorney is sufficient proof of due service of the cross-complaint, and warranted the entry of default and conferred upon the court jurisdiction to render the judgment thereon."

The petition alleges not only the laws of California relating to proper service on a cross-action, but alleges how these statutes have been construed by the highest California courts, and, therefore, the courts of Texas are bound by these allegations unless the evidence adduced upon the trial on the merits should show otherwise: *Hanley* v. *Donoghue,* 116 U. S. 1, 6 S. Ct. 242; *American National Bank of Oklahoma* v. *Garland,* 235 S. W. 562 (by Com. App. of Texas); *Mitchell* v. *San Antonio Public Service Co.,* 35 S. W. (2d) 140 (by Tex. Com. App.).

The full faith and credit clause of the constitution requires that the judgment of a state court, which had jurisdiction of the parties and of the subject-matter in suit, shall be given, in the courts of every other state, the same credit, validity and effect which it has in the state where it was rendered, and be equally conclusive upon the merits: *Roche* v. *McDonald,* 275 U. S. 449, 48 S. Ct. 142, 72 L. Ed. 365; *Hanley* v. *Donoghue,* 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535; *Fauntleroy* v. *Lum,* 210 U. S. 231, 28 Sup. Ct. 641, 52 L. Ed. 1039; *Kenney* v. *Supreme Lodge,* 252 U. S. 411, 40 Sup. Ct. 371, 64 L. Ed. 638, 10 A. L. R. 716.

With respect to the finality of the California judgment, respondent admitted in the Texas courts that under the laws of California the said judgment was final and that the laws of that state controlled as to this issue: *American National Bank of Oklahoma* v. *Garland,* 235 S. W. 562 (by Com. App. of Texas); Volume 3, Freeman on Judgments (5th Ed.), Section 1391, page 2873.

A default judgment or decree of another state is equally conclusive as to the rights thereby adjudicated as any other kind or class of judgment: *Ellis* v. *Mills,* 28 Texas 584; *Allen-West Commission Co.* v. *Gibson* (Tex. Civ. App.), 228 S. W. 342; *Fred Miller Brewing Co.* v.

Capital Ins. Co.; 11 Iowa 590, 82 Am. St. Rep. 579, 82 N. W. 1023; Volume 2, Freeman on Judgments (5th Ed.), Section 663, at page 1393; Volume 3, Freeman on Judgments (5th Ed.), Section 1361, at page 2805.

POINT SIX.

The substantive rights and liabilities of a dissolved corporation are determined by the laws of the state of its creation; but the method or manner of obtaining service upon a dissolved corporation, as well as making service on all other defendants, is determined by the law of the forum.

It is not the substantive law of California as to liability of dissolved corporations that controls the judgment here sued on, but the substantive law of Texas controls the validity of the California judgment, for the reason that the pleadings in the California court show that the Beaumont Export & Import Company was a Texas corporation. *Ferguson McKinney Dry Goods Company* v. *Garrett*, 252 S. W. 739 (by Texas Com. App.); reversing judgment (Tex. Civ. App.) 235 S. W. 245; *Seth* v. *Lew Hing* (Cal.), 14 Pac. (2d) 537 (holding that in winding up affairs of a corporation the laws of its creation control); *Illinois Power & Light Corporation* v. *Hurley*, 49 F. (2d) 681, and cases cited; *Wettentel* v. *Robinson*, 136 Atl. 673 (Sup. Ct. 1927); *Kelley* v. *International Clay Products Co.*, 140 Atl. 143 (Sup. Ct. of Pennsylvania, 1928).

Though the cross-action was filed after the Beaumont Export & Import Company was dissolved (but before it was defunct), without notice to Montes or his attorney or to the court of such dissolution, *the proper manner or method of service of process on the cross-action against the said dissolved corporation must be determined by the*

California laws and not by those of Texas. Volume 3, Conflict of Laws by Beale, Section 589.1; Volume 3, Freeman on Judgments, Section 1454, at page 2992.

In the citation to Volume 3, Conflict of Laws by Beale, *supra,* the rule is stated as follows:

> *"The proper method of service of process is determined by the law of the forum. Each state has the right to prescribe by law how its citizens shall be brought into its courts. Harrymore and Schriver* v. *Roberts,* 53 Md. 64, 75."

In Freeman on Judgments, *supra,* the rule is stated in the text as follows:

> "Subject to the limitations of the federal constitution, the validity of service of process is determined by the law of the state where the judgment was rendered. *Lincoln Safe Deposit Company* v. *Continental Life Insurance Company* (Mo. App.), 249 S. W. 677. Hence, in an action upon a foreign judgment a defendant attacking the sufficiency of service of process by a person not an officer, must show that by the foreign law such service conferred no jurisdiction. *Robinson* v. *Freeman,* 236 Mass. 446, 128 N. E. 718."

California Statutes Relating to Dissolved Corporations, Extension of Corporate Existence, Etc.

The California statutes extending for certain purposes the corporate existence of dissolved corporations were not plead, for the reason that the substantive rights and liabilities of the Beaumont Export & Import Company, as a Texas corporation, were to be determined by the Texas and not by the California laws.

But the special California statute prescribing the method of making service on a dissolved corporation,

with respect to a cross-action is substantially the same as that prescribed by general statute for making service on all other defendants. This section is 402a, Civil Code, of the tenor following:

> "Summons or process against a dissolved corporation may be served by delivering a copy thereof to an officer, director or person having charge of its assets, or if no such person can be found, to any person who is, or at the time of dissolution was, an agent for service of process."

It would appear from the provision "at the time of dissolution was an agent for service of process," that the attorney, Bailey, under the allegations of the petition, would constitute such a person; *and, consequently, the service of process on him, who was the attorney of record for the Beaumont Export & Import Company at the time of its dissolution, would be in strict compliance with said statute.*

The petition (paragraph 22, R. 17) *alleged that the manner or method of service on a cross-action, as prescribed by the California statutes, was reasonable, inherently just and afforded an opportunity to adverse parties to be heard and to have "their day in court."*

The California statutes extending the corporate life of dissolved corporations are shown in verbatim copies thereof in the Appendix. There is no substantial difference between the California and the Texas statutes on this subject, *except only that the California law places no limit on the period of the extension, while the Texas statutes limit the extended period to three years.*

The first or original California statutes thus extending the corporate existence of a dissolved corporation went into effect in 1929 and were amended in 1931 and 1933; and the original statutes and the amendments

thereto and the special statute relating to service on a dissolved corporation are copied verbatim in the Appendix.

The case of *Nezik* v. *Cole*, 184 Pac. 523, was relied on by respondents in the state courts to support their contention that the Beaumont Export & Import Company upon its dissolution could no longer sue or be sued and served with process in California, as was the rule under the common law; *but that case was tried and decided by the California courts a few years before 1929, when the above mentioned California statute changed the common law rule. Therefore, the case cannot now be in point even if the California law controlled.*

It is a general principle—and the rule obtains both in Texas and California—that if there is no pleading and proof of the applicable laws of a sister state, there arises a presumption that the laws of the sister state, whether statutory or common law, are the same as those of the forum. *Abercrombie* v. *Stillman*, 77 Tex. 589, 14 S. W. 196; *James* v. *James*, 81 Tex. 573, 16 S. W. 1087; *Bradshaw* v. *Mayfield*, 18 Tex. 28; *Porcheler* v. *Bronson*, 50 Tex. 555.

Applying this established rule, the California court, in adjudicating the cross-action against the Beaumont Export & Import Company, could and should properly have presumed that the law of Texas extending the life of corporations for the purpose of suing and being sued, etc., (there being no pleading nor proof of the laws), was the same as the California statutes on the subject then in force; and such presumption would thus have been in accord with actual fact.

Respectfully submitted,

M. G. Adams,
Counsel for Petitioner.

APPENDIX.

The following are verbatim copies of the Texas statutes involved and being a part of the Revised Civil Statutes of Texas for 1925.

Jurisdiction of Supreme Court.

Art. 1728. Appellate Jurisdiction. The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from final judgment of trial courts:

1. Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

2. Those in which one of the Courts of Civil Appeals holds differently from a prior decision of its own, or of another Court of Civil Appeals, or of the Supreme Court upon any such question of law.

3. Those involving the construction or validity of statutes necessary to a determination of the case.

4. Those involving the revenues of the state.

5. Those in which the Railroad Commission is a party.

6. In any other case in which it is made to appear that an error of substantive law has been committed by the Court of Civil Appeals which affects the judgment, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by statute.

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction.

Provided further that in cases of conflict named in Subdivision 2 above, the Supreme Court may, in its discretion, refuse the writ of error, where the court is in agreement with the decision of the Court of Civil Appeals in the case in which the application is filed; and in cases of such conflict with a previous opinion of the Supreme Court, the Supreme Court may, in its discretion, without the necessity of granting the writ and hearing the case, reverse and remand the same on the application for writ of error.

Art. 1729. Writ of Error or Certificate. All causes mentioned in the preceding article may be carried to the Supreme Court either by writ of error or by certificate from the Court of Civil Appeals, but the Court of Civil Appeals may certify any question of law arising in any such case at any time they may choose, whether before or after the decision of the case in said court.

Art. 1739. Good Cause to be Shown. The Supreme Court may review final judgments of Courts of Civil Appeals upon writ of error, when good cause therefor be shown by application for such writ, as hereinafter re-

quired, the sufficiency of such cause to be determined as herein provided.

Art. 1740. Petition for Writ of Error. A writ of error before the Supreme Court may be applied for by petition addressed to said court and the petition shall contain such other requisites as may be prescribed by the Supreme Court; provided that said petition shall be sufficient if it complies with the requirements of Article 1741.

Art. 1741. Requisites of Application. In all cases taken to the Supreme Court by writ of error it shall be sufficient if the petition for the writ of error shall contain the following:

(1) A brief statement as to the nature and result of the suit in the Court of Civil Appeals.

(2) Specifying briefly the particular grounds and/or ruling or rulings of the Court of Civil Appeals on which the error is based, with such statements from the record as are necessary to show that same was erroneous and was material to the decision.

(3) The authorities relied on, if any.

(4) A statement and/or argument on the errors for which relief is sought.

Provided that more than one question may be presented in the same petition; and further provided that the Supreme Court may adopt rules with reference to writ of error procedure, but not inconsistent with the provision of this Act or any other statute.

Art. 1742. Filing. The petition shall be filed with the clerk of the Court of Civil Appeals within thirty days from the overruling of the motion for rehearing.

Art. 1743. Petition With Record. The petition with the original record in the case, and the opinions of the Court of Civil Appeals, and the motion filed therein, and certified copies of the judgments and orders of the Court of Civil Appeals and copy of the appeal or supersedeas bond shall be filed with the Supreme Court. The party applying for the writ of error shall deposit with the clerk of the Court of Civil Appeals a sum sufficient to pay the expressage or carriage of the record to and from the clerk of the Supreme Court, which sum shall be charged as costs in the suit.

Art. 1757. Briefs. In all cases appealed to the Court of Civil Appeals and/or taken to the Supreme Court, it shall be sufficient if said briefs contain the following:

1. A statement as to the nature and result of the suit.

2. The alleged error or errors upon which the appeal is predicated.

3. The authorities relied upon.

4. A statement and/or argument on the errors assigned. Provided, however, that the Supreme Court may adopt rules with reference to the form and time of filing of briefs generally, but not inconsistent with the provisions hereof.

Art. 1762. Motion for Rehearing. A motion for rehearing may be filed with the clerk of the court within fifteen days after the date of entry of the judgment or decision of the court, and not later. Should the court adjourn within less time than fifteen days after the rendition of the judgment, it may make such rules and regula-

tions with reference to the filing of the motion as it may deem proper. The grounds relied upon for the rehearing shall be distinctly specified in the motion. The motion shall give the name and residence of the counsel of the opposing party if known, and if not known, the name and residence as shown in the record.

Jurisdiction of Court of Civil Appeals.

Art. 1819. Jurisdiction Defined. The appellate jurisdiction of the Courts of Civil Appeals shall extend to all civil cases within the limits of their respective districts of which the District Courts and County Courts have or assume jurisdiction when the amount in controversy or the judgment rendered shall exceed one hundred dollars exclusive of interest and costs.

Art. 1821. Judgment Conclusive on Law. The judgments of the Courts of Civil Appeals shall be conclusive on the law and facts, nor shall a writ of error be allowed thereto from Supreme Court in the following cases, to-wit:

1. Any civil case appealed from the County Court or from a District Court, when, under the Constitution a County Court would have had original or appellate jurisdiction to try it, except in probate matters, and in cases involving the Revenue Laws of the State or the validity or construction of a Statute, or cases involving conflicts between decisions of the Courts of Civil Appeals or between a decision of a Court of Civil Appeals and a decision of the Supreme Court.
2. All cases of slander.
3. All cases of divorce.

4. All cases of contested elections of every character other than for State officers, except where the validity of a statute is questioned by the decision.

5. In all appeals from interlocutory orders appointing receivers or trustees, or such other interlocutory appeals as may be allowed by law.

6. In all other cases as to law and facts, except where appellate jurisdiction is given to the Supreme Court, and not made final in said Courts of Civil Appeals.

Art. 1844. Assignments of Error. The appellant or plaintiff in error need not file assignments of error with the clerk of the court below, but he may embody in his brief in the appellate court all assignments of error distinctly specifying the grounds on which he relies. All errors not distinctly specified are waived, but an assignment shall be sufficient which directs the attention of the court to the error complained of. The appellee or defendant in error need not file his cross-assignments of error with the clerk of the court below but may embody them in his brief filed in the appellate court.

Art. 1846. Appearance by Brief, etc. The attorneys for both the plaintiff and defendant may file written, typewritten or printed briefs or argument, if written not to exceed fifteen (15) pages; and the court shall be required to notice the same as if it were the personal appearance of the attorney, and shall not dismiss any suit or cause where such brief or argument is filed with the papers for want of further prosecution. Said briefs shall be sufficient if they comply with the requirements of Article 1757.

Art. 1877. Motion for Rehearing. Any party desiring a rehearing of any matter determined by any Court of Civil Appeals, may, within fifteen days after the date of entry of the judgment or decision of the court, or the filing of the findings of fact and conclusions of law, file with the clerk of said court his motion in writing for a rehearing thereof, in which the ground relied upon for the rehearing shall be distinctly specified, and the name and residence of the counsel of the opposing party if known, and if not known, then the name and residence of the opposing party as shown in the record. If the court adjourns within less than fifteen days after the rendition of the judgment, the motion may be made at such time and in such manner as may be prescribed by rules to be made by the Supreme Court.

Art. 1881. Filing Copy of Application. When an application for a writ of error from a Court of Civil Appeals to the Supreme Court is filed in the Court of Civil Appeals, the applicant shall at the same time deposit with the clerk of said Court of Civil Appeals a true copy of the application and shall notify the attorney of record of the defendant in error of the deposit of said copy.

Art. 1883. Forward to Supreme Court. When a petition for a writ of error to the Supreme Court is filed with the clerk of a Court of Civil Appeals, he shall note upon his record the filing of said petition, and promptly forward the same to the clerk of the Supreme Court with the original record in the case and the opinion of the Court of Civil Appeals, the motions filed therein, certified

copies of the judgment and orders of the Court of Civil Appeals, and a copy of the appeal or the supersedeas bond of the plaintiff in error.

Dissolution of Corporations.

Art. 1388. Liquidation by Officers. Upon the dissolution of a corporation, unless a receiver is appointed by some court of competent jurisdiction, the president and directors or managers of the affairs of the corporation at the time of its dissolution shall be trustees of the creditors and stockholders of such corporation, with power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them after paying all just and reasonable expenses; and for this purpose they may in the name of such corporation, sell, convey and transfer all real and personal property belonging to such company, collect all debts, compromise controversies, maintain or defend judicial proceedings, and exercise full power and authority of said company over such assets and property. Said trustees shall be severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall have come into their hands.

Art. 1389. Extension of Existence. The existence of every corporation may be continued for three years after its dissolution from whatever cause, for the purpose of

enabling those charged with the duty to settle up its affairs. In case a receiver is appointed by a court for this purpose, the existence of such corporation may be continued by the court so long as in its discretion it is necessary to suitably settle the affairs of such corporation.

Art. 1390. Effect of Dissolution. The dissolution of a corporation shall not operate to abate, nor be construed as abating any pending suit in which such corporation is a defendant, but such suit shall continue against such corporation and judgment shall be rendered as though the same were not dissolved.

Art. 1391. Suit on Claim. When no receiver has been appointed for said corporation, suit may be instituted on any claim against said corporation, as though the same had not been dissolved, and service of process may be obtained on the president, directors, general manager, trustee, assignee, or other person in charge of the affairs of the corporation at the time it was dissolved, and judgment may be rendered as though the corporation had not been dissolved, and the assets of said corporation shall be liable for the payment of such judgment as if said corporation had not been dissolved.

Art. 1392. May Sue Stockholders. If a corporation, except a railway, charitable or religious corporation, be dissolved leaving debts unpaid, suit may be brought against any person or persons who were stockholders at the time of such dissolution without joining the corporation in such suit; and if judgment be rendered and execution satisfied, any defendant may sue all who were

stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable.

Art. 1393. Apportionment of Debt. Execution upon such judgment shall direct the collection to be made from the property of each stockholder respectively. If any number of stockholders-defendants in the case shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved.

Art. 1394. Forced Apportionment. Any stockholder who pays more than his due proportion of any debt of the corporation may, by suit, compel contribution from the other stockholders.

California Statutes Relating to Dissolved Corporations

ORIGINAL LAW OF 1929.

Civil Code, Sec. 399. Powers of corporation after dissolution. All corporations, whether they expire by their own limitation, by forfeiture of charter by order of court, or otherwise dissolved, shall nevertheless continue to exist for the purpose of winding up their affairs, prosecuting and defending actions by or against them, and of enabling them to collect and discharge obligations, to dispose of and convey their property, and to collect and divide their assets, but not for the purpose

of continuing the business for which the corporation was established.

Any assets inadvertently or otherwise omitted from the winding up shall continue in the dissolved corporation for the benefit of the persons who could have been entitled thereto upon dissolution of the corporation, and on realization shall be distributed accordingly.

Before the payment of any part of the capital and before beginning the business for which the corporation was created, the incorporators named in any articles of incorporation may dissolve the corporation by filing in the office of the secretary of state a certificate, verified by the oath or affirmation of a majority of the incorporators named in the articles of incorporation, that no part of the capital has been paid and no debts are unpaid, and thereupon the said corporation shall be dissolved.

Civil Code, Section 400. Unless other persons are appointed by the court, the directors or managers of the affairs of the corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation.

1931 AMENDMENT.

Section 399, Civil Code: Continuation of corporation after dissolution. All corporations, whether they expire by their own limitation, by forfeiture of existence by order of court, or are otherwise dissolved, shall nevertheless continue to exist for the purpose of winding up their affairs, prosecuting and defending actions by

or against them, and of enabling them to collect and discharge obligations, to dispose of and convey their property, and to collect and divide their assets, but not for the purpose of continuing business except in so far as necessary for the winding up thereof. No action or proceedings to which a corporation is a party shall abate by the dissolution of such corporation.

Any assets inadvertently or otherwise omitted from the winding up shall continue in the dissolved corporation for the benefit of the persons entitled thereto upon dissolution of the corporation, and on realization shall be distributed accordingly (added by Stats. 1931, p. 1821).

1933 AMENDMENT.

Section 399. Continuation of corporation after dissolution. (A corporation which is dissolved by the expiration of its term of existence) by forfeiture of existence by order of court, or otherwise (nevertheless shall) continue to exist for the purpose of winding up (its) affairs, prosecuting and defending actions by or against (it) to collect and discharge obligations, dispose of and convey (its) property, and ( ) collect and divide (its) assets, but not for the purpose of continuing business except in so far as necessary for the winding up thereof. No action or (proceeding) to which a corporation is a party shall abate by the dissolution of such corporation (or by reason of proceedings for dissolution and winding up thereof).

Any assets inadvertently or otherwise omitted from the winding up shall continue in the dissolved corporation

for the benefit of the persons entitled thereto upon dissolution of the corporation, and on realization shall be distributed accordingly. (In effect 90 days from and after May 22, 1933. Sec. 1a, Art. IV, Const.; Stats. 1933, Chap. 533.)

Service on Dissolved Corporation.

Section 402a, Civil Code:

Summons or process against a dissolved corporation may be served by delivering a copy thereof to an officer, director or person having charge of its assets, or if no such person can be found, to any person who is, or at the time of dissolution was, an agent for service of process. If no such person can be found, summons or process may be served upon the dissolved corporation by delivering a copy thereof to the Secretary of State or an assistant or deputy Secretary of State.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 197.

ESTABAN ADAM, PETITIONER,

VS.

WILLIAM SAENGER ET AL., RESPONDENTS.

RESPONDENTS' BRIEF.

OLIVER J. TODD,
Attorney for Respondents.

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Of Counsel.

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OPINION OF THE COURT BELOW.

The opinion is found reported in full in 101 S. W. Rep. (2d), p. 1046.

JURISDICTION OF THE COURT.

Jurisdiction invoked to grant a writ of certiorari must be plainly shown to exist, and not inferred.

The court of civil appeals, whose judgment is sought to be reviewed here, is an intermediate court of appeals of Texas over whose decisions the Supreme Court of Texas has appellate jurisdiction.

This appellate jurisdiction of the Supreme Court is coextensive with the limits of the state extending to all questions of law arising in cases brought to the court of civil appeals from final judgments of the trial courts, as fixed by Texas Civil Statutes, Article 1728, copied in full in petitioner's brief, page 57, and reading in part:

> "6. In any other case in which it is made to appear that an error of substantive law has been committed by the court of civil appeals which affects the judgment."
>
> "In all cases where the judgment of the court of civil appeals is a correct one and where the principles of law declared in the opinion of the court are *correctly* determined, the Supreme Court shall *refuse* the application; in all cases where the judgment of the court of civil appeals *is a correct* one but the Supreme Court is not satisfied that the opinion of the court of civil appeals in all respects has correctly declared the law, it shall dismiss the case *for want of jurisdiction.*"
>
> Acts 1927, 40th Leg., p. 214, Ch. 144, Sec. 1.

Petitioners here duly filed with the Supreme Court of Texas their application for writ of error in this case which was by that court "dismissed for want of jurisdiction" (Rec. 79).

Petitioners in their brief, at page 24, make the statement, that, by "want of jurisdiction," as used in the dismissed order:

> "The Supreme Court did not mean that it was without jurisdiction of the cause within the general meaning of that term, but merely that it regarded the judgment by the court of civil appeals as cor-

rect, but that it was not satisfied that the said opinion in all respects had correctly declared the law as provided by the Texas statute prescribing the 'appellate jurisdiction' of the Supreme Court."

This conclusion is not justified by anything in the law.

It is apparent that if petitioners' contention that the judgment of the court of civil appeals failed or refused to give "full faith and credit" to the judgment of a sister state, an error of substantive law has been committed, and that fact, standing alone, would *require* the *granting* of the writ by the Supreme Court. Such an application could not be "dismissed for want of jurisdiction" on the assumption that the judgment of the court of civil appeals was correct regardless of reasons that might be given in justification of such refusal.

It is therefore impossible for the Supreme Court of Texas to dismiss "for want of jurisdiction" the application for writ of error upon the theory that the denial of this federal right was *correct*. In that event the writ must be refused. Other reasons must be found why the writ was "dismissed for want of jurisdiction."

Explanation for this order of the Supreme Court on the application may be found in the provisions of the statute and rules of that court.

Under the heading "Good cause to be shown," Article 1739 of the Texas Revised Statute in force states:

> "The Supreme Court may review final judgments of courts of civil appeals upon writ of error when good cause therefor be shown by application

for such writ, as hereinafter required, the sufficiency of such cause to be determined as herein provided."

Under the heading "Petition for writ of error," Article 1740, provides:

"A writ of error before the Supreme Court may be applied for by petition addressed to said court and the petition shall contain *such other requisites* as may be prescribed by the Supreme Court" (see Arts. 1739 and 1740, at p. 58, Petitioners' Brief).

The Supreme Court passed rules governing applications for writs of error under this statute, which were in force at the time this application was made.

Rules of the Supreme Court, 121 Texas 745.

(These rules in full as reported in 121 Texas, *supra*, are found on page 1087 *et seq.*, Moffett's Texas Form Book, 7th Edition, and Stayton's Method of Practice in Texas Courts, page 626 *et seq.*, wherein the statutes are also fully set out.)

Rule 1 under the heading "Requisites" reads:

"(a) Applications for writs of error (3) shall be *absolutely true to the record;* and (4) shall conform to the requirements herein prescribed and the provisions of the statute. For a *failure to observe* the above requisites the court may require the application to be amended so as to conform thereto, and in case of an obviously negligent or purposeful failure to observe them, may on its own motion or that of opposing counsel *dismiss the application* 'for want of jurisdiction.'"

Continuing the reading of the rules to Subdivision (F), that provision reads:

> "There shall be contained in one of the first sections of the application and immediately following a brief statement of the case, if such statement is made, a subdivision entitled;
>
> 'GROUNDS OF JURISDICTION'
>
> in which subdivision it shall be made to affirmatively appear that the case is one of which the Supreme Court has jurisdiction under Art. 1728, as amended by Ch. 144 of the Acts of the 40th Leg., and in which it shall further affirmatively appear (omitting provisions intervening) Subdivision (6) if the case be one in which an error of substantive law has been committed by the court of civil appeals, it must be made to *affirmatively appear from the application* not only that such error was committed but the manner in which the same injuriously affected the plaintiffs' right to recover, or the defendants' right to maintain his defense."

The application for writ of error in this case, as shown in the record before this court (Rec. 75), makes no effort to comply with this rule of the court. It contains no "grounds of jurisdiction" and such requirement under the rules of the court is of such importance as to fully justify the Supreme Court, under the rules, to dismiss the writ *"for want of jurisdiction,"* as provided by the rule.

This is at least showing full authority and power in the Supreme Court to dismiss the application for writ of error in this case without inspecting it further than

to determine that it was not in compliance with its rules.

If the order entered by the Supreme Court on this application is not thus justified; other reasons would have to be found, as it could not be possibly based on the view of the petitioners presented in this case.

It might be justified on another apparent ground. Noting the requirement in the rules (3) "shall be absolutely true to the record" and in this connection, consider the first assignment of error presented in this application which contains the following statement:

> "The petition alleged that *after* the judgment on the cross action had been entered, the *statutory trustees* and successors of the Beaumont Export and Import Company *retained* Richard F. Bailey as their attorney and authorized him to enter *their* appearance in said cause pending in the Superior Court of California for the purpose of setting aside the said judgment and for filing an answer to the cross action, and that said trustees, through their said duly authorized attorney, *did make their general appearance in said, filed motion to set aside said judgment* and thereupon joined issues as to *all of the facts* relating to whether or not the service obtained against the Beaumont Export and Import Company on the cross action was proper and sufficient under the laws of California and therein litigated all the fact issues, *relating to jurisdiction* and the court having found against them on all of said fact issues, and having found that the service was adequate, and having entered judgment to that effect, all of said issues became *res judicata* and said statutory trus-

tees are therefore estopped to assert the said service was insufficient under the laws of California and they thereby waived all defects or lack of service."

Looking to plaintiff's petition to which the general demurrer was sustained and from which order the appeal had been perfected, the fact statements contained in the assignments of error *are not true to the record.*

The petition, in aid of its conclusions, attaches as exhibits thereto and as parts thereof, exhibits containing the papers referred to as justifying such conclusions. The action taken by Mr. Bailey speaks for itself and is set out in full in the record (Rec. 29). It expressly states that "plaintiff and cross defendant, *Beaumont Export and Import Company, a Texas corporation,* will move said court for its order setting aside the default, etc." (Rec. 29). The grounds of that motion do not raise any question as to the jurisdiction of the court, *contrary* to the statement contained in this assignment. The grounds are stated in this notice as follows:

> "That said judgment was entered against plaintiff and cross defendant through the mistake, inadvertence, surprise or excusable neglect of plaintiff's and defendant's and cross defendant's counsel" (Rec. 29).

The Supreme Court of Texas could reasonably, under its rules, have dismissed "for want of jurisdiction." This applies because it was not "absolutely true to the record."

If these or other reasons caused the Supreme Court of Texas to "dismiss for want of jurisdiction" petitioners'

application, then, this appeal and the right to the petition for certiorari here would be controlled by such opinions of this Honorable Court as *John* v. *Paullin,* 231 U. S., 58 L. Ed. 381, and the writ of certiorari would be denied.

Petitioners here had the *right of appeal* to the Supreme Court of Texas, the highest court of that state, for a revision and correction of any errors of law committed by the court of civil appeals in this case. The fact that they negligently or willfully *failed to invoke* the appellate jurisdiction of that court in the *manner provided by law* and because of *that fact* they failed to obtain the judgment of that court upon the merits of their controversy, this court will not in the exercise of its jurisdiction grant any relief.

Wherefore, respondents respectfully move the court to dismiss this proceeding.

SUMMARY OF ARGUMENT.

I.

The Beaumont Export and Import Company, a Texas corporation, having been legally dissolved prior to the time the action against it was instituted and being nonexistent from that time and at the time the judgment in said action was rendered, such proceeding and judgment is void.

II.

The substituted service of process on Bailey as agent in California of Beaumont Export and Import Company, a Texas corporation, was ineffective as conferring jurisdiction over the company or its representatives authorizing the California court to render the personal judgment against it.

III.

Proceedings had in the California court subsequent to the entry of the judgment here sued on are ineffective as giving to such judgment any validity.

ARGUMENT.

May It Please the Court:

We will cite few authorities, indulging the presumption that in view of legal principles discussed, it will be unnecessary.

I.

The Beaumont Export and Import Company, a Texas corporation, having been legally dissolved prior to the time the action against it was instituted and being non-existent from that time and at the time the judgment in said action was rendered, such proceeding and judgment is void.

It is admitted, the common law is in force in Texas and California. At common law "after a corporation has become effectually dissolved" such dissolution "destroys its capacity to be sued at law because a judgment can no more be rendered against a dead corporation than against a dead man" (*Orange Lumber Co.* v. *Toole,* 181 S. W., at p. 825).

This established rule is the law of Texas and California, except, in so far as it has been changed by statute in those states.

The Beaumont Export and Import Company, a corporation created by and existing under the laws of Texas, was legally dissolved on September 15, 1930 (Rec. 13), and the petitioners' suit was filed in the California court against it November 7, 1932 (Rec. 23), and the final personal judgment against it thereon, by default, was

entered May 24, 1933 (Rec. 26). The pleading is against it, a living corporation which "*is now*, and was at all times hereinafter mentioned, duly organized and *existing* under the laws of the State of Texas" (Rec. 21), and the judgment is against it as "a Texas corporation" (Rec. 26).

If, therefore, this personal judgment by default against a corporation organized and dissolved legally in Texas, entered in a proceeding begun after its dissolution, in the courts of California, is valid, it must acquire its validity from some statute. Certain statutes of California were duly pleaded (Rec. 8) and, in connection with existing Texas statutes, relied on as giving validity to the proceeding and judgment (Petitioners' Brief 64).

These statutes abrogate the common-law rule that upon dissolution of the corporation its real property reverts to the grantor, its personal property escheats to the sovereign and all debts owing by or to it are extinguished. Their intent, and effect is to provide for the preservation and control of its properties for the benefit of its stockholders and creditors after its dissolution in a somewhat similar manner in which the preservation and control of the properties and estate of an individual after his death is provided for.

The statutes of a state have no extraterritorial operation,

> *C., R. I. & P. Ry.* v. *Thompson*, 100 Tex., at p. 189,

and the courts of another state take no judicial notice of their existence. Before they may be con-

sidered for any purpose by the courts of another state, the jurisdiction of such courts must be invoked by plea and their existence and provisions proven as any other fact material to the rights claimed.

It would seem clear that Texas statutes could be relevant or have any bearing upon the question here, since no statute of that state was plead or reliance placed thereon or rights claimed therefrom, and hence, such statutes could have no effect, in any way, upon that proceeding.

Where "the public acts, records and judicial proceedings" of a state come before the courts of another state, they will be given "full faith and credit" and if, under existing statutes of the reviewing state, such "judicial proceedings" would be valid, if had in that state; then, in support of such proceedings had in the sister state, the courts of the reviewing state, in the absence of pleadings, will *presume* that statutes exist in the sister state of like kind.

Ferguson-McKinney D. G. Co. v. *Garrett,* 252 S. W. 739.

In the California proceeding no "public act, record or judicial proceeding" of Texas or its courts, was involved. There was no remote reference to any such. No "public act, record or judicial proceeding" of Texas, to which "full faith and credit" could be given. None such even referred to as existing.

The California proceeding was wholly one begun for personal judgment against a named nonentity; a corporation which had once been created by and existed

under the sovereign will of the State of Texas, but which had long since been dissolved and rendered nonexistent, by that same sovereign decree.

There was nothing shown in that proceeding by which the California court could assume or acqure jurisdiction to render a personal judgment by default against a legally dissolved, one time, Texas corporation. No thing there shown that such jurisdiction was invested in Texas courts. No statute, "public act, record or judicial proceeding" of Texas plead or claimed under which such any court, anywhere, could acquire or have jurisdiction to entertain such proceeding or pronounce such judgment. No statute or law of California could invest it with jurisdiction. None of the pleaded statute or laws of California may be construed as making such attempt or having such intent or effect. All such pleaded statutes apply alone to those corporations *created by that* state. Any attempt to give them extraterritorial force and application to corporations created by a sister state, would be absolutely void.

It is obvious, therefore, that the judgment here in question is nothing more than a personal judgment by default against a nonresident of the state, who was dead at the time the proceeding was begun and the judgment entered and over whose person the court did not have and could not, under any law, acquire jurisdiction to render such judgment and same is an absolute nullity everywhere, and that it is "not susceptible of ratification or conformation and its nullity cannot be waived."

Easterline v. *Bean*, 49 S. W. (2d) at page 429.

If what has been said is correct, further discussion would be surplusage; but the same final conclusion is reached by considering additional record facts.

II.

The substituted service of process on Bailey as agent in California of Beaumont Export and Import Company, a Texas corporation, was ineffective as conferring jurisdiction over the person of the company or its representatives authorizing the California court to render the personal judgment against it.

Bearing in mind the fact that the judgment here involved is a personal judgment by default against a Texas corporation, which had been legally dissolved by the state creating it, long prior to the time the proceeding in which the judgment rendered *was begun.*

To render such judgment, the court must have, at the time, jurisdiction over the *person* of the defendant.

While the pleading upon which the judgment was based is called "a cross action or cross complaint," we assume it correct as stated in plaintiff's petition here, Paragraph 4:

> "Under the applicable statutory provisions and the decisions of the courts of last resort of the State of California, a cross action or cross complaint is regarded, deemed and construed as another suit separate and distinct from the main action in which it is filed" (Rec. 4).

Jurisdiction over the "person" of the named defendant, was acquired, *if at all,* by the following proceeding:

One Rodolfo Montes, on November 7, 1932, filed in the Superior Court of the State of California in and for the County of Los Angeles, his "cross complaint" so styled, No. 279850, entitled *Beaumont Export and Import Company, a Texas Corporation, Plaintiff and Cross-Defendant,* v. *Rodolfo Montes,* in which it is stated:

> "Now comes Rodolfo Montes, by leave of court first had and obtained, and files this, his cross complaint against the plaintiff and cross defendant, and alleges as follows:
>
> (1) That the cross defendant is now, and was at all times hereinafter mentioned, *duly organized and existing* under the laws of the State of Texas" (Rec. 21). (Followed by fact statements with prayer for judgment.)

In same numbered and styled cause was filed, on November 12, 1932, "Affidavit of service of cross complainant and order permitting filing of cross complaint" signed by W. M. Eggeman and sworn to, reading:

> "W. M. Eggeman being sworn says: I am and was on the dates herein mentioned over the age of eighteen years and not a party to this action: I served the copy of cross complaint and order permitting filing of cross complaint in this action by personally delivering to and leaving with the (fol. 40) following person at the County of Los Angeles on the date set opposite their respective names, a true copy thereof, to-wit: Richard F. Failey, by leaving with clerk in office, Nov. 9, 1932" (Rec. 24).

This service is claimed effective as conferring jurisdiction over the *person* of the named defendant under

Sections 1015 and 442 of the Statutes of California and Section 1011, Code of Civil Procedure. It is stated in plaintiff's petition:

> "All of the aforementioned statutory provisions of California, to-wit, Sections 442, 1011 and 1015, and the decisions of the courts of last resort of California construing the said statutes, constitute and embrace the law of the instant case applicable to obtaining proper service and giving adequate notice to the opposite party in cross actions" (Rec. 17-18).

The material portions of said respective laws, as set out in plaintiff's petition, Section 1011, headed "Notices and papers, when and how served," read:

> "The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:
>
> (1) If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them between the hours of nine in the morning and five in the afternoon, in a conspicuous place in the office" (Rec. 8).

Section 442, styled "Cross Complaint" reads:

> "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happen- (fol. 33) ing or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer,

file at the same time, or by permission of the court subsequently, a cross complaint. The cross complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint. If any of the parties affected by the cross complaint have not appeared in the action, a summons upon the cross complaint must be issued and served upon them in the same manner as upon the commencement of an original action" (Rec. 18).

Section 1015 designated "Service where defendant resides out of state" reads:

> "When a plaintiff or a defendant, who has appeared, resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk or on the justice where there is no clerk, for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs and other process issued in the suit, and of papers to bring him into contempt" (Rec. 18).

It is clear that these statutory provisions do not relate in any way to a *"dissolved"* corporation either domestic or foreign. They contain no provision for service of process on any "dissolved" corporation. This fact is recognized by the act or amendment passed in California subsequent to the proceedings herein involved, shown on page 69, petitioners' brief, wherein, it is provided in Section 402 a, Civil Code:

> "Summons or process against a *dissolved* corporation may be served by delivering a copy thereof to an officer, director or person having charge of its assets, or if no such person can be found, to any person who is, or at the time of the dissolution was, an agent for service of process. If no such person can be found, summons or process may be served upon the dissolved corporation by delivering a copy thereof to the secretary of state, or an assistant or deputy secretary of state."

Of course, this statute is without operation here because passed subsequent to the transaction herein involved; could relate only to domestic corporations and was not pleaded in this action, and, if considered, shows upon its face that the service relied on in this case was *not such,* or upon the *person,* or in the *manner* stated in this act and would even there be ineffective as service.

The record in this case shows no law existent in California by which a *"dissolved"* corporation could be brought into court to answer a suit against it. By the Act of 1929 (Petitioners' Brief 67), it is provided that where corporations expire by their own limitation, forfeiture of charter by order of court, or otherwise dissolved, it continues to exist for the purpose of winding up their affairs, prosecute or defend actions by or against them and that unless other persons are appointed by the court, the *directors or manager of the affairs* of the corporation at the time of its dissolution *are trustees* of the creditors or stockholders or members of the corporation dissolved and have full power to settle the affairs of the corporation.

If this article of the California statute had any bearing upon a Texas corporation which had been dissolved (which it has not), then, these trustees act collectively in their aggregate capacity as a body and *not* as individuals and (quoting from Tex. Jur., Vol. II, p. 133, in Sec. 469),

> "An action to establish a liability of the corporation must designate all the surviving directors *as defendants,* and *all of them must be cited to appear and answer the plaintiff's demand.*"
>
> *Witherspoon* v. *T. & P. Ry. Co.,* 48 Tex. 309-319.
> *Corsicana Transit Co.* v. *Walton,* 189 S. W. 307 (s. c. 222 S. W. 979).

Under the Texas law governing Texas corporations, after dissolution, it could be sued; but *its trustees* were necessary parties to such action and indispensable as such, and the statute required that *they be served with citation.* No Texas statute provides that any person may be brought into court to answer a complaint by service of process on his attorney, whether he be in that case or some other case.

From the statutes of California, which we have considered, this appears to be the same rule there, because it is expressly provided that whereas certain *notices* may be served on the attorney, all *writs* and *process must be served on the party.*

The rule in Texas under its statute as passed on by the courts of that state and giving them effect is (quoting from 1 Tex. Jur., p. 147, in Sec. 106):

> "by them, actions against corporations which are dissolved *pendente lite* are viewed as suspended only;

new parties may be made; the assets may be distributed through a receivership or the corporation may be treated as continuing."

Lyon-Gray Lbr. Co. v. *Gibralter Life Ins. Co.*, 269 S. W. 80.

Abilene S. L. Co. v. *Shackelford*, 284 S. W. 622.

It is undoubtedly a correct rule of law as stated in *Cleveland* v. *Williams*, 29 Tex., at p. 214:

> "The death of the principal is an instantaneous and absolute revocation of the authority of the agent unless the power be coupled with an interest."

In *Hunt* v. *Rousmanier*, 5 L. Ed. 589, it is stated:

> "We think it well settled that a power of attorney though irrevocable during the life of a party becomes extinct by his death."

In 6 C. J., p. 675, the rule is thus stated:

> "The death of the client, or in the case of a corporation or partnership, *its dissolution vacates* the power of attorney and the latter is neither required *nor authorized* to do anything further."

Mr. Bailey, who was the surviving member of the law firm representing the Beaumont Export and Import Company, a living corporation, in its suit in California, ceased to be such attorney upon the legal dissolution of his corporate client.

This is material only, in that, from the date of the dissolution, under the law, Mr. Bailey was neither an attorney nor agent for the defendant Texas Corporation; therefore service on him, in any event, would be value-

less and any action that he might have taken *would be unauthorized.*

Indeed the California record, as presented here, conclusively shows that Mr. Bailey's actions were always in utter ignorance of the fact that his former client had been dissolved. No suggestion of that character was made to the California court and when the cross complaint was filed, it was expressly alleged therein that the defendant was an *existing corporation.* This allegation of corporate existence is necessary (*Bank of Alabama* v. *Simonton,* 2 Tex. 531), and although, even if the provisions of the Texas statute did not positively require such an allegation, it certainly contemplates the same, because "the reasons for this averment, if there are no others, are found in its purpose, which is to fix the venue of the suit and to inform the court and its officers *upon whom the service of the process should be made,* as well as to show the *capacity* of the *defendant* to sue and be sued." *G. H. & S. A. Ry.* v. *Smith,* 81 Tex. 479.

III.

Proceedings had in the California Court subsequent to the entry of the judgment here sued on are ineffective as giving to such judgment any validity.

The defendant in that judgment was a Texas corporation, it must dwell in the place of its creation and though it may do business in all places where its charter allows, wherever it goes for business it carries its charter, as that is the law of its existence. This charter is the same abroad that it is at home; whatever disabilities are placed upon the corporation at home it retains abroad and what-

ever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. Whenever it deals beyond the state of its creation it must be taken by those who deal with it as a creature of the law of its own state and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Every person who deals with such corporation subjects himself to such laws of the state of its creation affecting powers and obligations of the corporation with which he voluntarily contracts. To all intents and purposes he submits his contract with the corporation to such a policy of the sister state of foreign government and whatever is done by that creative sovereign in furtherance of that policy. He is conclusively presumed to have contracted with a view to such laws of that government or state, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony.

> "It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere."
>
> *Canada S. R. Co.* v. *Gebhard,* 109 U. S. 27 L. Ed. at p. 1024.

Under the laws of Texas, the corporation, defendant in the judgment referred to, had been dissolved. Its dissolution put an immediate end to all of its corporate activities. Its officers, directors and agents ceased as such immediately. They, as such, had no further powers

of any kind. The corporate entity could not contract; could not have agents or representatives, and was as completely dead as an individual would be after death.

When the dissolution of the corporation occurred, the law of the state creating it, dissolved it.

By Texas statutes the directors of a corporation, at its dissolution "are designated trustees, because in discharge of the duties imposed upon them, they would not act under authority of the franchise and charter of the company, but merely as the representatives of its stockholders and creditors." They act as trustees collectively and not as individuals. As directors they no longer have the power and authority to act for the corporation *qua*, directors or officers.

Witherspoon v. *T. & P. Ry.*, 48 Tex. 309-319.

These directors undertaking to settle all the affairs of a corporation in the capacity of trustees after its dissolution are individually liable for breach of duty and their liability is that of trustees.

Comrads v. *Kasch*, 26 S. W. (2d) 732.

For this reason it is the holding of the Texas courts that while suit, after dissolution, may be brought or defended by the dissolved corporation, the trustees are indispensable parties. Otherwise, such trustees would not have complete control of the assets of the dissolved corporation.

When the California suit was brought against this dissolved corporation it was named defendant as "existing under the laws of Texas," a living, acting corpo-

rate entity. No where in the California proceeding is it disclosed that this corporation had been dissolved. If such disclosure had been made it would have placed it in the same status before the courts of that state as if it had been an individual who resided in Texas and who was dead.

The corporation had no power to act nor did it have any agents of any character to act for it. Suggestion of its dissolution would have stayed all proceedings. The trustees could have come in and shown by pleading their right under the Texas statute to be substituted for the defunct corporation as a party and to continue to litigate as such, but they are the only ones who could do that. The opponents of the corporate entity could have suggested its dissolution and sought under the provisions of the Texas statute to proceed with the litigation and in that event they could have made the trustees parties to the action and brought them as such and as individuals before the courts of that state if process, which would have that effect, could be discovered.

None of these things were done, however, and to do either of them, a statutory right and cause of action, as existing under the Texas laws would *have to be shown* and for that reason no recovery could be had and no further action taken and any contention made that such a right did exist under Texas statute is answered by the courts of Texas, thus:

> "It is argued that this state creates a cause of action and that the suit was brought to recover on the cause of action given by the statute. A suf-

ficient answer to this contention is that the suit is not based on the statute and the petition does not allege a cause of action within the statute. If plaintiff desired to recover on a cause of action created by the statute, it should have specifically pleaded the facts which show a cause of action under the statute."

Smith v. *Briggs-Weaver Mch. Co.*, 132 S. W. 954.

Petitioners contend that the defendants, respondents here, appeared through their attorney, Bailey, and undertook to set aside the default judgment and presented there the issue of the jurisdiction of the court over the person of the defendant to enter the judgment.

This contention is wholly misleading. The acts and proceedings speak for themselves and conclusively show that Mr. Bailey asssumed to act for an *existing* corporate body and that, too, without knowledge that it had been dissolved. This is apparent from the pleading he filed. He made no reference to the corporation having been dissolved. He made no reference to the existence of trustees or to the continuation of litigation by or against it. The sole allegation and bases for his motion is:

"That said judgment was entered against said plaintiff and cross defendant (shown by the pleadings to be an existing, living corporation) through the mistake, inadvertence, surprise or excusable neglect of plaintiff's and cross defendant's counsel" (Rec. 29).

If Mr. Bailey had known at that time the corporation had been dissolved, he would have known that he

no longer had any authority to act for it in any capacity. That by its dissolution his authority as its attorney ceased for all purposes. He would have disclosed to the court that the corporation had been dissolved and thereby stayed any action on the part of the court in any of the pending proceedings. The court, upon that suggestion and proof of that fact, would unhesitatingly have vacated its judgment and held under its own laws that it was without jurisdiction to render such judgment. The question of jurisdiction to enter the judgment was *never before* the California court by pleading, proof, or suggestion and that court never considered that question or passed upon it, as disclosed by the record in this case.

These proceedings all took place after the rendition of the judgment and that judgment being void when rendered, could not be ratified or by action of the trustees or any other person, be validated.

CONCLUSION.

It is submitted that jurisdiction in this court has not been shown to exist and furthermore that the judgment of the court of civil appeals sought to be reviewed in this case is in all things correct in its conclusions of law and application thereof to the facts of this case;

Wherefore, respondents pray that the writ herein granted be dismissed or the judgment of the Court of Civil Appeals of Texas in all things affirmed.

OLIVER J. TODD,
Attorney for Respondents.

GEO. E. HOLLAND,
Of Counsel.

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Supreme Court of the United States

No. 197

OCTOBER TERM, 1937

ESTABAN ADAM, *Petitioner*,
v.
WILLIAM SAENGER, ET AL., *Respondents*

Respondent's Motion for Rehearing

OLIVER J. TODD,
Attorney for Respondents

Of Counsel:
GEO. E. HOLLAND

Supreme Court of the United States

No. 197

OCTOBER TERM, 1937

ESTABAN ADAM, *Petitioner,*
v.
WILLIAM SAENGER, ET AL., *Respondents*

Respondent's Motion for Rehearing

MAY IT PLEASE THE COURT:

Respondents respectfully present this their motion for rehearing herein, and as ground therefor submit:

This Honorable Court in its decision of this case failed to consider the material fact that the judgment considered was one against a nonentity. That at the time the proceeding was begun in which attempted service of process was had and in which the personal

judgment by default was rendered against the named defendant therein, "Beaumont Export and Import Company, a Texas Corporation," such named defendant was neither a natural person, a corporation nor a partnership.

Plaintiff's petition, to which the trial court sustained a general demurrer, as showing no right of action in favor of the plaintiff therein named, as against the defendants therein named, shows upon its face, as a part of the action, that the plaintiff's relief asked, as against the defendants therein named, was founded upon this personal default judgment and that it was one in an action brought and prosecuted to judgment against an empty name which was neither a person, corporation nor partnership in being, but a nonentity.

Treating such a judgment and proceeding as a mere nullity upon which no legal rights could be founded, or, from which no legal rights could be acquired under the laws of Texas, California, or any other state, that court, as provided by the rules of procedure in force in Texas, sustained a general demurrer to the petition and the plaintiff refusing to amend, dismissed his suit.

This action of the trial court was founded upon the quoted text in CORPUS JURIS, Vol. 47, p. 19, sec. 24:

> "If the suit is brought in a name which is that of neither a natural person, a corporation, nor a partnership, it is a mere nullity; in such case it has been held that the whole action fails."

In the same volume of CORPUS JURIS (47) at page 66, Section 138, it is stated:

> "A party, in order to be capable of being sued must have an entity which the court can recognize, either as a natural or artificial person, or a quasi-artificial person. *The capacity to be sued exists only in persons in being.*"

Looking to the opinion of this Honorable Court in this case, nothing said therein may be disputed, treating the "Beaumont Export and Import Company" *as an entity*. But if it had been correctly there referred to, treated and regarded *as a nonentity, not a person in being*, then, what is said in the opinion would have been so qualified as to point out the fact that it was not applicable to the defendant "Beaumont Export and Import Company, a Texas Corporation" named in the judgment sued on, *because there was no such entity, corporate or otherwise*, as expressly shown to the trial court and this Court in the plaintiff's petition, to which, and because of that showing therein, the demurrer was sustained.

That being true, then, the Texas trial court, governed by the law as quoted from the text supra, being the law of Texas and not alleged or claimed to be different in California, was compelled to and correctly did hold such judgment void and as giving to the plaintiff, assignee thereof, no rights thereunder to be recognized by the courts of Texas or elsewhere.

The matters discussed are presented in respondents' brief in this court, but since this Court, in its opinion, made no reference to the status of the defendant "Beaumont Export and Import Company" *as being a non existent entity* at the time the judgment against it was rendered and the action against it was begun, in which the judgment was rendered, we feel impelled to here again consider that named defendant as one *having had* corporate existence under Texas law at a time prior to these proceedings, but which had, long before the proceeding was begun, *been legally dissolved and died*, under the law and in the state of its creation, as alleged in the petition to which demurrer was sustained, if this Honorable Court had considered this case in the light of this *correct status* of the "Beaumont Export and Import Company" as an entity, we assume it would have referred to it as having

its true status and dealt with the case in that light.

Thus treating the status of that company or "*name*" we find the law of Texas to be that the legal dissolution of a corporation "destroys its capacity to be sued at law because a judgment can no more be rendered against a dead corporation than against a dead man" (ORANGE LUMBER CO. v. TOOLE, 181 S.W. at p. 825).

There is no law in California to the contrary, and none so alleged in plaintiff's petition to change the Texas rule. Certainly it would not be necessary to more than state that under the law of both Texas and California, a judgment, obtained in a suit brought against a dead man, is a nullity.

In BROOKS v. BOSTON AND N. ST. RY. CO., 221 Mass. 277, 97 N.E. Rep. 760, it is stated by the court:

> "An action at law implies by its very terms, the existence of a person who has a right to bring the action. It is axiomatic that a corpse is not a person."

In MAURY v. TURNER, 244 S.W. 809, the Supreme Court of Texas, at the bottom of page 811 states:

> "The judgment in cause No. 4699 was not binding on any body. It was void from the beginning. The whole proceeding was without authority of law, because the suit was brought by a private person against 'the unknown owner' of the property. The petition named no one as party defendant."

But it may be contended that while this is the common law rule and although the common law is in force in both Texas and California, still, this common law rule has been modified by the statutes of those States. This we may now notice.

We take it to be settled law that the statutes of a State have no extra-territorial operation (see R.I. & P. RY. CO. v. THOMPSON, 100 Texas, at page 189). From which it follows necessarily that no statute of the State of California

can have any bearing upon a corporation created and dissolved by the laws of Texas, therefore no pleaded statute of California could have any relevancy or bearing. No statute of California could extend the life of a Texas corporation for any purpose, or give a cause of action against it, after its dissolution in Texas. Texas only could do that.

The Texas statutes are before this Court. The courts of Texas have passed upon them and the rule and decision of this Honorable Court is, as to their effect, "whatever is matter of law in the court appealed from is matter of law here."

In a suit claiming a right given by statute, the cause of action must be founded upon the statute authorizing the relief sought. Thus it is stated in SMITH v. BRIGGS-WEAVER MCH. CO., 132 S.W., at page 955, as follows:

> "It is argued that this statute created a cause of action and that the suit was brought to recover on the cause of action given by the statute. A sufficient answer to this contention is that the suit is not based on the statute and the petition does not allege a cause of action within the statute. If plaintiff desired to recover on a cause of action created by the statute it should have specifically pleaded the facts which show a cause of action under the statute."

The law of California is not alleged or shown to be different and if any judgment was to be obtained against the named defendant, a *dissolved and dead corporation,* or that would establish any rights as against its successors or property, such action would have to be brought under the particular statute, giving that right of action, whether it be a statute of Texas or California, and this was not done as is shown by the record in the California case.

Before the California court would acquire jurisdiction to enter any judgment against a corporation which had been

created and existed under the laws of Texas, and which had been legally dissolved under the laws of Texas, its jurisdiction would have to be invoked by a plea showing such legal right, and if based upon a Texas statute, such statute must be pleaded in connection with it, and such facts as would show a cause of action under it (CANADA S.R. Co. v. GEBHARD, 109 U.S., 27 L. Ed., at page 1024).

The only possible cause of action against the "Beaumont Export and Import Company, a Texas Corporation," after its legal dissolution, would be one given by the statutes of Texas, and as stated in COYNE v. SOUTHERN PAC. CO., 155 Fed., at page 684:

> "Viewed as a statutory right, it must be admitted that the state creating the right can attach to it any valid condition, so that, when the right is sought to be vindicated in another state or in a foreign country, the condition must also be applied. Hamilton v. R.R. Co., 39 Kan. 56, 18 Pac. 57; Slater v. Mexican Nat. R.R. Co., 194 U.S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900; Minor's Conflict of Laws, Sec. 202. 'As the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation (Smith v. Condry, 1 How. (U.S.) 28, 11 L. Ed. 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.' Slater v. Mexican Nat. R.R. Co., supra."

Under the settled rule of decision of the courts of Texas, passing upon, construing and giving effect to the existing Texas statutes, the judgment of the California court under discussion, *would be a nullity if rendered by a Texas court under a proceeding begun and prosecuted in like manner there.*

The particular statute upon which the right of action was founded, would have to be pleaded (SMITH v. BRIGGS-WEAVER, supra). The status of the named defendant as a dissolved corporation would have to be pleaded as necessary to show a cause of action. "The reasons for this averment, if there are no others, are found in its purpose, which is to fix the venue of the suit and to inform the court and its officers upon whom the service of process should be made, *as well as to show the capacity of the defendant to sue and be sued.*" (G.H. AND S.A. RY. v. SMITH, 81 Tex. 479). "The action to establish a liability of the corporation (defunct) must designate all of the surviving directors *as defendants and all of them must be cited to appear and answer the plaintiff's demand*" (WITHERSPOON v. T. & P. RY. CO., 48 Tex. 309-319; CORSICANA TRANSIT CO. v. WALTON, 189 S.W. 307; s.c., 222 S.W. 979). For the obvious reason that these directors act only "in the capacity of trustees after the dissolution are individually liable for breach of duty and their liability is that of trustees" (COMRADS v. KASCH, 26 S.W. (2d) 732).

Certainly the courts of Texas could not be required by "R. S., Sec. 905, 28 U.S.C. 687" to pronounce valid and give force to a judgment of a sister state, which was founded on a right of action (if it had foundation at all), against a defunct corporation of Texas, given only by statute of Texas, and which proceeding and judgment, if had in the Texas courts, would be a nullity there. Such is the status of the California judgment involved in this case.

We now briefly refer to the service of process on Mr. Bailey, which this Court pronounced valid. Dealing with "Beaumont Export and Import Company, a Texas Corporation" as an entity, as this Court did, we may not question anything said by the Court. But dealing with it as a *nonentity, a corpse*, as the record shows it to be, we think this Honorable Court will agree with us that the California statute quoted,

has no reference to the "attorney" of a corpse or nonentity as being "the corporation's attorney of record," and, if it did, it would be void.

Upon its dissolution it lost its identity. Its officers and directors were no longer such. Its agents and attorneys eo instanti lost all powers and connections. "The death of the principal is an instantaneous and absolute revocation of the authority of the agent" (CLEVELAND v. WILLIAMS, 29 Tex. at page 214." A power of attorney though irrevocable during the life of a party becomes extinct by his death" (HUNT v. ROUSMANIER, U.S., 5 L. Ed. 589). "The death of the *client* or in the case *of a corporation, its dissolution* vacates the power of attorney and the latter is neither required *nor authorized* to do anything further (CORPUS JURIS, Vol. 6, p. 675, Sec. 188).

These are general legal principles and the law in all of the states and it would seem unreasonable that by statute, a state could extend the agency contract beyond the death of the principal, so that, by service on this *extended* agent, obtain jurisdiction over the corpse of the dead principal. We know of no authority for such powers.

We respectfully submit that the status of the "Beaumont Export and Import Company" as being a nonentity—a corpse, when the action was begun and the personal judgment entered, as shown in plaintiff's petition against it, should be so treated, and that such judgment should be so dealt with and its validity and effect thereby measured and determined. When so regarded, we cannot escape the conclusion that the judgment is a void judgment in Texas and California alike, and the Texas courts could not, under settled decisions, principles and policies, treat it as having validity or effect. To do so would disrupt and reverse the law and policies of that state.

May we respectfully suggest that the entity or nonentity of the named defendant is the point. As to an entity, one rule

governs. As to a nonentity, or corpse, we urge the rules herein stated as governing, and respectfully ask the Court to reconsider this case and decide the same in the light of that distinction, as to it may seem proper.

Respectfully submitted,

OLIVER J. TODD,
Attorney for Respondents

Of Counsel:
GEO. E. HOLLAND

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SUPREME COURT OF THE UNITED STATES.

No. 197.—October Term, 1937.

Estaban Adam, Petitioner, vs. William Saenger, et al. | On Writ of Certiorari to the Court of Civil Appeals for the Ninth Supreme Judicial District of the State of Texas.

[January 31, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is whether the action, in this case, of the Texas state courts, in dismissing a suit founded upon a judgment of the supreme court of California, denied to the judgment the faith and credit which the Constitution commands.

Petitioner, as assignee of a California judgment against the Beaumont Export & Import Company, a Texas corporation, brought the present suit in the Texas state district court against respondents, directors of the corporation acting as its trustees in dissolution, and against its stockholders as transferees of corporate assets, to collect the judgment. His petition sets out in detail the circumstances attending the rendition of the California judgment and incorporates by reference a duly attested copy of the judgment roll.

It appears that the corporation brought suit in the Superior Court of California, a court of general jurisdiction, against Montes, petitioner's predecessor in interest, to recover a money judgment for goods sold and delivered. Thereupon Montes, following what is alleged to be the California practice, with leave of the court brought a cross-action against the corporation, by service of a cross-complaint upon the corporation's attorney of record in the pending suit, to recover for the conversion of chattels. Judgment in the cross-action, taken by default, was followed by dismissal of the corporation's suit and is the judgment which is the subject of the present suit. A motion to open the default and to be allowed to defend, made later on behalf of the corporation, was contested and was denied by the court, the issue being whether the complaint was in fact served on the plaintiff's attorney.

cross-

The trial court sustained a general demurrer to the complaint and gave judgment dismissing the cause, which the Court of Appeals affirmed, 101 S. W. (2d) 1046. Petition to the Texas supreme court for a writ of error was denied for want of jurisdiction. We granted certiorari, — U. S. —; cf. *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499, the question being an important one of constitutional law. Our writ is properly directed to the Court of Civil Appeals, it being the highest court of the state in which a judgment could be had. *Bacon* v. *Texas*, 163 U. S. 207, 215; *Sullivan* v. *Texas*, 207 U. S. 416; *San Antonio Railway* v. *Wagner*, 241 U. S. 476; *American Railway Express Co.* v. *Levee*, 263 U. S. 19.

The Court of Civil Appeals rested its decision on a single ground, want of jurisdiction of the California court over the corporation in the cross-action in which the judgment was rendered. Construing the California statutes and decisions which the complaint set out, it concluded that they did not authorize service of the complaint in the cross-action upon the plaintiff's attorney of record. It held further that in any case as the corporation was not present within the state no jurisdiction could be acquired over it by the substituted service, and the California judgment was consequently without due process and a nullity beyond the protection of the full faith and credit clause. To review these rulings we brought the case here. Cf. *Ward* v. *Love County*, 253 U. S. 17, 25; *Indiana ex rel. Anderson* v. *Brand*, No. 256, decided this day.

By R. S. § 905, 28 U. S. C. 687, enacted under authority of the full faith and credit clause, Art. IV, § 1 of the Constitution, the duly attested record of the judgment of a state is entitled to such faith and credit in every court within the United States as it has by law or usage in the state from which it is taken. If it appears on its face to be a record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself. *Hanley* v. *Donoghue*, 116 U. S. 1; *Knowles* v. *Gas Light & Coke Co.*, 19 Wall. 58; *Settlemier* v. *Sullivan*, 97 U. S. 444. But in a suit upon the judgment of another state the jurisdiction of the court which rendered it is open to judicial inquiry, *Chicago Life Insurance Co.* v. *Cherry*, 244 U. S. 25, and when the matter of fact or law on which jurisdiction depends was not litigated in the original suit it is a matter to be adjudicated in the suit founded upon the judg-

ment. *Thompson* v. *Whitman*, 18 Wall. 457. Here the fact of the service of the complaint upon the attorney is alleged by the petitioner and admitted by the demurrer, but the court's conclusion that the California court was without jurisdiction, resting in part upon its construction of the California statutes, presents an issue not litigated in the California suit which must be determined in the present one.

Congress has not prescribed the manner in which the legal effect of the judgment and the proceedings on which it is founded in the state where rendered are to be ascertained by the courts of another state. It has left that to the applicable procedure of the courts in which they are drawn in question. Where they are in issue this Court, in the exercise of its appellate jurisdiction to review cases coming to it from state courts, takes judicial notice of the law of the several states to the same extent that such notice is taken by the court from which the appeal is taken. "Whatever is matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here." *Hanley* v. *Donoghue, supra*, 6.

According to Texas law the legal effect of the judgment of another state, on which suit is brought, is to be determined by the court, not the jury. But a suitor who asserts that the force and effect of the judgment is different from that of a similar judgment of the courts of the state is required to allege specifically and prove as matter of fact the particular laws or usage on which he relies to establish the difference, and on demurrer only the law or usage specifically alleged will be considered in determining whether the law of another state differs from that of Texas. *Porcheler* v. *Bronson*, 50 Tex. 555; *Gill* v. *Everman*, 94 Tex. 209; *National Bank of Commerce* v. *Kenney*, 98 Tex. 293.

In the present suit petitioner, in conformity to the state procedure, has set out in his complaint the California statutes and the citations of the decisions of California courts which he contends establish the law of that state that a cross-action in a pending suit may be begun by service of a cross-complaint upon the plaintiff's attorney. The question thus raised upon demurrer for decision by the court is the legal effect in California of the service, and hence of the judgment founded upon it. Whether the question be regarded as one of fact or more precisely and accurately as a ques-

tion of law to be determined as are other questions of law, although procedural exigencies require it to be presented by the pleading and proof, as are issues of fact, it is one arising under the Constitution and a statute of the United States which commands that such faith and credit shall be given by every court to the California proceedings "as they have by law or usage" of that state. And since the existence of the federal right turns on the meaning and effect of the California statute, the decision of the Texas court on that point, whether of law or of fact, is reviewable here. *Stanley* v. *Schwalby,* 162 U. S. 255, 274, 277-279; *Southern Pacific R. Co.* v. *Schuyler,* 227 U. S. 601, 611; *Creswill* v. *Knights of Pythias,* 225 U. S. 246, 261; *Ancient Egyptian Order* v. *Michaux,* 279 U. S. 737, 744-746; *Norris* v. *Alabama,* 294 U. S. 587, 590; see *Northern Pacific R. Co.* v. *North Dakota,* 236 U. S. 585, 593; cf. *Union Pacific R. Co.* v. *Public Service Comm'n,* 248 U. S. 67, 69; *Ward* v. *Love County, supra,* 22; *Truax* v. *Corrigan,* 257 U. S. 312, 324; *Davis* v. *Wechsler,* 263 U. S. 22, 24; *Patterson* v. *Alabama,* 294 U. S. 600, 602.

While this Court reexamines such an issue with deference after its determination by a state court, it cannot, if the laws and Constitution of the United States are to be observed, accept as final the decision of the state tribunal as to matters alleged to give rise to the asserted federal right. This is especially the case where the decision is rested, not on local law or matters of fact of the usual type, which are peculiarly within the cognizance of the local courts, but upon the law of another state, as readily determined here as in a state court. *Huntington* v. *Attrill,* 146 U. S. 657, 684; *Yarborough* v. *Yarborough,* 168 S. C. 46, 290 U. S. 202.

In ruling that the service in the California suit was unauthorized, the Court of Civil Appeals said:

"The cross action was not an ancillary proceeding, but an independent suit in which a final judgment could be rendered without awaiting a decision in the original suit. Farrar *v.* Steensburg, 173 Cal. 94, 159 Pac. 707. It is well settled in this State that a cross action occupies the attitude of an independent suit and requires service of the cross action upon the cross defendant. Harris *v.* Schlinke, 95 Tex. 88. This being so, in the absence of a waiver of service, or an appearance by the cross defendant, personal service on the cross defendant must be had to confer jurisdiction upon the court to determine the matter and render judgment in the case."

But the question presented by the pleadings is the status of a cross-action under the California statutes, not under those of Texas. We think its status is adequately disclosed by the California statutes and decisions pleaded by petitioner, and is that for which he contends.

Section 442 of the California Code of Civil Procedure specifically provides that a defendant may secure affirmative relief upon "cross-complaint" which "must be served upon the parties affected thereby", and requires service of "summons upon the cross-complaint" only upon such parties as "have not appeared in the action."[1] Arguing that "action means only "cross-action" and not the original action brought by the plaintiff, the Texas court concluded that a plaintiff who has not appeared in the cross-action must be served with summons "as upon the commencement of an original action." But the word "action", even if susceptible of such meaning, cannot be so interpreted in the face of the pleaded California decisions which hold that a cross-complaint may be served on the attorney of one who is already a party to the original action. *Farrar* v. *Steenburgh*, 173 Cal. 94; *Wood* v. *Johnston*, 8 Cal. App. 258; *Ritter* v. *Braash*, 11 Cal. App. 258.

Section 1015 provides that in all cases where a party, whether resident or non-resident, has an attorney in an action, "the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs and other process issued in the suit, and of papers to bring him into contempt."[2] The Court of Civil Appeals construed this section as requiring "service of subpoenas, of writs, and other process issued in the suit" upon the party rather than the attorney, and as including the cross-com-

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1 "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint. If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action."

2 "When a plaintiff or a defendant, who has appeared, resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk or on the justice where there is no clerk, for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs and other process issued in the suit, and of papers to

plaint in the terms "writ" and "process". But assuming that a cross-complaint served without summons may be so characterized, it is clear that the section does not by its terms preclude valid service of the cross-complaint upon the attorney for a party which, as we have seen, § 422 permits. Section 1015 directs service upon the attorney of all but the three types of papers excepted, but says nothing as to the effectiveness of service of those papers upon him. Section 1011, set out in the pleading though not referred to in the court's opinion, reads, "Notices and papers, when and how served. The Service may be personal, by delivery to the party or attorney on whom the service is required to be made. . . ."

The question whether § 1015 does forbid service of a cross-complaint on the attorney has been definitely answered in the negative by the Supreme Court of California, which, in *Farrar* v. *Steenburgh, supra,* 97, held, "Service of a cross-complaint upon a plaintiff who appears by an attorney is not made by a summons to the plaintiff, but by delivery of a copy of the cross-complaint to the attorney." Upon this ground the California District Court of Appeals, in cases on which petitioner relies, has sustained judgments taken upon default in a cross-action begun by service of the cross-complaint on the plaintiff's attorney. *Ritter* v. *Braash, supra; Wood* v. *Johnston, supra.* Upon all the pleaded evidence of the California law, to the consideration of which we are restricted by the present state of the record, we think the only inference to be drawn is that the service in the California suit was authorized by California law.

There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff in its courts, upon service of process or of appropriate pleading upon his attorney of record. The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which jus-

bring him into contempt. If the sole attorney for a party is removed or suspended from practice, then the party has no attorney within the meaning of this section. If his sole attorney has no known office in this state, notices and papers may be served by leaving a copy thereof with the clerk of the court or with the justice where there is no clerk, unless such attorney shall have filed in the cause an address of a place at which notices and papers may be served on him, in which event they may be served at such place."

tice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff. *Young Company* v. *McNeal-Edwards Co.*, 283 U. S. 398, 400; compare *Chicago & Northwestern Railway Co.* v. *Lindell*, 281 U. S. 14, 17.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

Mr. Justice BLACK concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.